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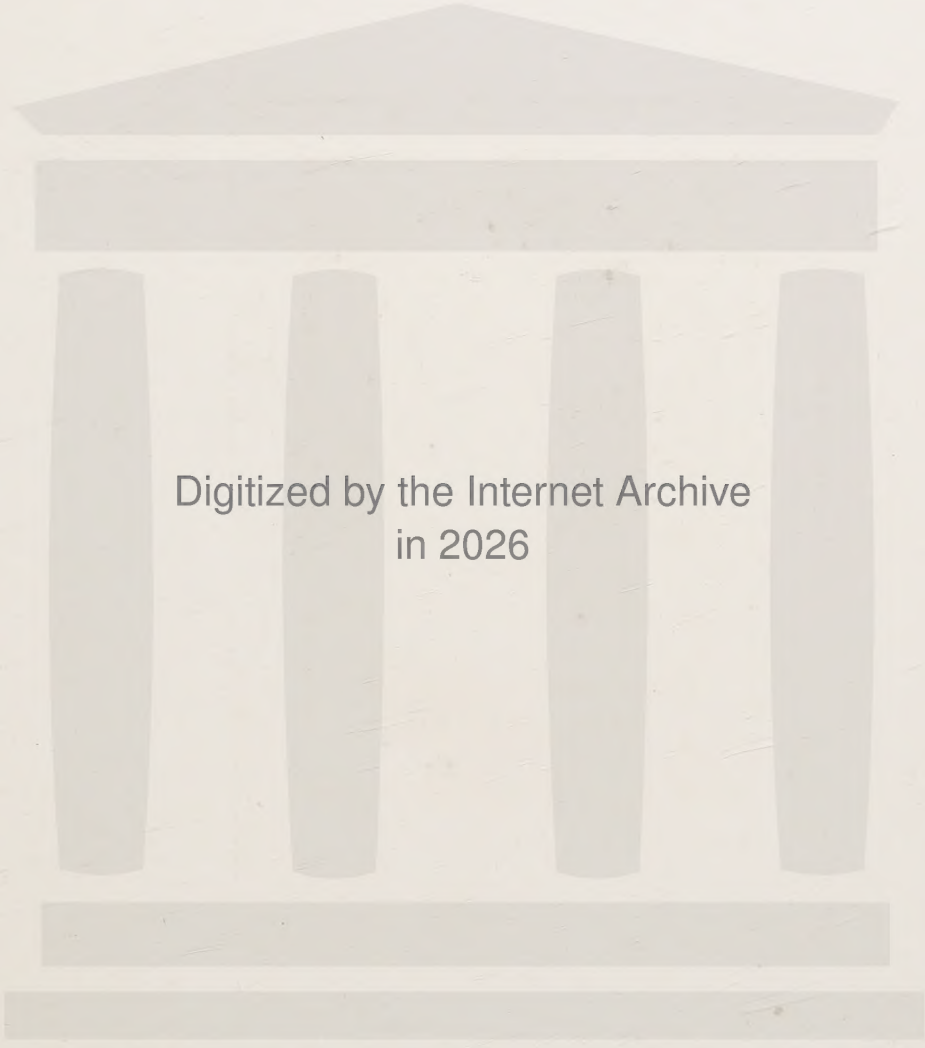
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Publications of the
Carnegie Endowment for International Peace
DIVISION OF INTERNATIONAL LAW
WASHINGTON, D. C.

By the Editor of and Uniform with this Collection of Cases

Judicial Settlement of Controversies Between States of the American Union

An Analysis of Cases decided in the Supreme Court of the United States

The United States of America

A Study in International Organization

I can not refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. (*Lord Campbell in Regina* v. *Millis, 10 Clark & Finnelly, 777, decided in 1844.*)

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand. (*Chief Justice Fuller in Kansas* v. *Colorado, 185 United States, 125, 146–147, decided in 1902.*)

Confederations have existed in other countries than America; republics have been seen elsewhere than upon the shores of the New World; the representative system of government has been adopted in several states of Europe; but I am not aware that any nation of the globe has hitherto constituted a judicial power in the same manner as the Americans. (*Alexis de Tocqueville, De la Démocratie en Amérique, 2 Vols., 1835, Vol. I, p. 158.*)

The Supreme Court of the United States, which is the American Federal institution next claiming our attention, is not only a most interesting but a virtually unique creation of the founders of the Constitution. . . . The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or in the modern world. (*Sir Henry Sumner Maine, Popular Government, 1886, pp. 217–218.*)

American experience has made it an axiom in political science that no written constitution of government can hope to stand without a paramount and independent tribunal to determine its construction and to enforce its precepts in the last resort. This is the great and foremost duty cast by the Constitution, for the sake of the Constitution, upon the Supreme Court of the United States. (*Edward John Phelps, The United States Supreme Court and the Sovereignty of the People, 1890, Orations and Essays, 1901, pp. 58–59.*)

The extraordinary scope of judicial power in this country has accustomed us to see the operations of government and questions arising between sovereign states submitted to judges who apply the test of conformity to established principles and rules of conduct embodied in our constitutions.

It seems natural and proper to us that the conduct of government affecting substantial rights, and not depending upon questions of policy, should be passed upon by the courts when occasion arises. It is easy, therefore, for Americans to grasp the idea that the same method of settlement should be applied to questions growing out of the conduct of nations and not involving questions of policy. (*Elihu Root, Judicial Settlement of International Disputes, 1908, Addresses on International Subjects, 1916, pp. 151–2.*)

JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

COLLECTED AND EDITED

BY

JAMES BROWN SCOTT, A.M., J.U.D., LL.D.

Director of the Division of International Law, Carnegie Endowment for International Peace; Formerly Dean of the Los Angeles Law School, Dean of the College of Law of the University of Illinois, Professor of Law in Columbia University, Solicitor for the Department of State of the United States

America has emerged from her struggle into tranquility and freedom, into affluence and credit.—The authors of her Constitution have constructed a great permanent *experimental answer* to the sophisms and declamations of the detractors of liberty. (*Sir James Mackintosh, Vindiciæ Gallicæ; Defence of the French Revolution and its English Admirers, 1791, p. 78.*)

IN TWO VOLUMES

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The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. (*Constitution of the United States, Article III, Section 1.*)

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. (*Constitution of the United States, Article III, Section 2.*)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (*Constitution of the United States, Article VI.*)

The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; . . . (*Constitution of the United States, Article III, Section 2.*)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. (*Constitution of the United States, XIth Amendment.*

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. (*Constitution of the United States, Article III, Section 2.*)

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State of Missouri, Complainant, v. State of Iowa, Respondent.

State of Iowa, Complainant, v. State of Missouri, Respondent.

Supreme Court of the United States, 1849.

[7 *Howard*, 660.]

The western and northern boundary-lines of the State of Missouri, as described in the first article of the constitution of that State, were as follows:—from a point in the middle of the Kansas River, where the same empties into the Missouri River, running due north along a meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary-line; thence east from the point of intersection last aforesaid, along the said parallel, to the middle of the channel of the main fork of the said River Des Moines; thence, &c., &c.

The constitution of the State of Missouri was adopted in 1820. But in 1816, an Indian boundary-line had been run by the authority of the United States, which in its north course did not terminate at its intersection with the parallel of latitude which passed through the rapids of the River Des Moines, and in its east course did not coincide with that parallel, or any parallel of latitude at all.

Missouri claimed that this north line should be continued until it intersected a parallel of latitude which passed through certain rapids in the River Des Moines, and from the point of intersection be run eastwardly along the parallel to these rapids.

Iowa claimed that this Indian boundary-line was protracted too far to the north; that by the term "rapids of the River Des Moines" were meant certain rapids in the Mississippi River, known by that name, and that the parallel of latitude must pass through these rapids; the effect of which would be to stop the Indian boundary-line in its progress north, before it arrived at the spot which had been marked by the United States surveyor.

There being a bill and a cross-bill, each State is a defendant, and this court can pass such a decree as the case requires.

The southern boundary-line of Iowa is coincident with, and dependent upon, the northern boundary-line of Missouri.

Iowa is bound by the acts of its predecessor, the government of the United States, which had plenary jurisdiction over the subject as long as Iowa remained a Territory; and the United States recognized the Indian boundary-line,—1st. By treaties made with the Indians; 2d. By the acts of the general land-office; 3d. By Congressional legislation.

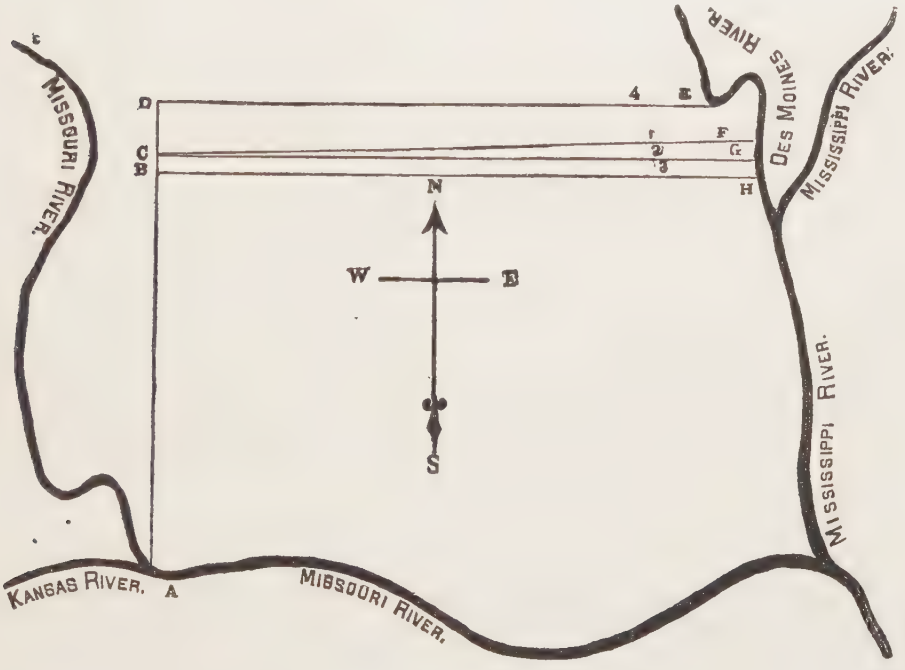
On the other hand, there are no rapids in the River Des Moines so conspicuous as to justify the claim of Missouri.

This court therefore adopts the old Indian boundary-line as the dividing line between the two States, and decrees that it shall be run and marked by commissioners.

The State of Missouri filed a bill against the State of Iowa, in the Supreme Court of the United States, with the consent of the State of Iowa, in order to settle a controversy which had arisen respecting the true location of the boundary-line which divided the two States.

The origin of the controversy is so fully stated by Mr. Justice
*661 * Catron, in delivering the opinion of the court, that it is only necessary for the Reporter to explain the pretensions of the respective parties ac-

cording to the map, without which they cannot be understood. This map or diagram is only intended to be illustrative of these claims, without pretending to be geographically accurate.



In July, 1820, the people living in the then Territory of Missouri, in pursuance of an act of Congress, adopted a constitution, in which are described the following boundaries:—

"Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west along the said parallel of latitude
*662 to the St. François River; * thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River; thence, from the point aforesaid, north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary-line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said River Des Moines; thence down along the middle of the main channel of the said River Des Moines to the mouth of the same, where it empties into the Mis-

sissippi River; thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning."

In 1821, Missouri was admitted into the Union with these boundaries.

By an act of Congress, approved August 4, 1820, the southern boundary of Iowa was made identical with the northern boundary of Missouri.

In 1816, prior to the passage of these laws, commissioners were appointed on the part of the United States to settle with the Osage chiefs the boundary of the cession which the Osage tribe had just made to the United States, and John C. Sullivan was appointed surveyor to run the line which should be thus agreed upon.

Beginning on the bank of the Missouri, opposite the mouth of the Kansas, at *A* in the diagram, he ran north just 100 miles to the point *C;* and thence pursued what he thought was a due east course, (but which was in fact to the north of east,) until he struck the River Des Moines at the point *F*. This line is marked No. 1, and runs from *C* to *F;* the true parallel of latitude being afterwards ascertained to be from *C* to *G*.

The State of Missouri alleged, that, at the point *E* in the River Des Moines, there existed rapids which answered the call in the constitution, and that the parallel of latitude spoken of in that instrument must consequently be a line running from *E* to *D,* and that the north line, which commenced at *A,* must therefore be protracted to *D,* where it intersected the parallel of latitude called for; that the phraseology used required the "rapids of the River Des Moines" to be in that river, and not in the Mississippi.

*663 * On the other hand, it was alleged by the State of Iowa, that in the Mississippi River, at the place marked *H,* there were rapids which were commonly called and known by the name of "the rapids of the River Des Moines," long anterior to the formation of the constitution of the Missouri; that the parallel of latitude must run through the head or centre of these rapids, and that the line *H B* would therefore be the true boundary, the point *B* being the spot where this parallel of latitude would intersect the line running north from *A*.

These were the claims of the respective parties. To sustain them, a great mass of evidence was taken on both sides.

The cause was argued by *Mr. Gamble* and *Mr. Green,* for the State of Missouri, and *Mr. Ewing* and *Mr. Mason,* for the State of Iowa.

The Reporter regrets that he cannot give an extended notice of the arguments of the respective counsel. But he is admonished, by the size which this volume has already attained, that he must reduce the cases which are yet to be reported to as small a compass as possible.

The positions assumed by the counsel respectively are thus stated in the briefs of *Mr. Green,* for Missouri, and *Mr. Ewing,* for Iowa.

Mr. Green.

On the part of the State of Missouri it is insisted,—

1st. That the words "rapids of the River Des Moines" constitute the controlling call to determine the northern boundary, and that the natural and obvious import of these words is "rapids *of* and *in* the River Des Moines itself."

2d. That the evidence establishes the fact, that there are rapids in the River Des Moines.

3d. That there is no ambiguity in reference to the river of which the rapids

are spoken, and none as to the rapids, unless more rapids than one are found in the River Des Moines.

4th. That having established the fact that there are rapids in the River Des Moines, thus satisfying the call of the constitution, no evidence can be introduced to contradict or vary the meaning of the constitution, or to prove that rapids of some other river were intended, different from that which the language indicates and describes.

5th. That the evidence offered does not prove the rapids in the Mississippi River to have been commonly known and called by the name "rapids of the River Des Moines," as alleged by Iowa.

6th. That if it were true that the rapids of the Mississippi were com-
*664 monly known and called "rapids of the River Des * Moines," still these rapids could not be taken as the rapids called for, as they do not answer to the description, while those *in* the Des Moines fulfil exactly the description, and none others will.

7th. But if the constitution be considered ambiguous, as between the rapids of the River Des Moines and rapids of the Mississippi, it serves only to let in proof of intention beyond what the language indicates. And on this point the evidence is clear in favor of Missouri.

From a full examination of all the facts and circumstances, as established by the evidence in connection with the language of the constitution, and by giving to each the weight to which it is entitled, we contend, in behalf of Missouri,—

1st. That the old Indian boundary-line (marked as line No. 1 on the diagram) cannot be the true northern boundary of Missouri, and the terms of the descriptive call do not allow the adoption of that line.

2d. That the parallel of latitude passing through the old northwest corner of the Indian boundary (marked on the diagram as line No. 2) is neither legally nor equitably the northern boundary of Missouri.

3d. That the parallel of latitude passing through the rapids of the Mississippi River (marked on diagram as line No. 3) will not fulfil the descriptive call of the constitution, and cannot be the northern line of the State.

4th. That the parallel of latitude passing through the rapids of the River Des Moines, at the Big Bend, in latitude 40 degrees 44 minutes 6 seconds north, (marked on the diagram as line No. 4,) will precisely and accurately satisfy the descriptive call of the constitution, and is the true northern boundary of the State of Missouri, as established by her constitution.

Mr. Ewing, for Iowa.

We will endeavour to show by the evidence, that, at the time of the adoption of the constitution, there was one object, and one only, namely, the rapids of the Mississippi, a few miles above the mouth of the Des Moines River, which was called in English "the rapids of the River Des Moines," and in French "les rapides de la Rivière Des Moines," which object had notoriety by that name; and that its position is every way adapted to satisfy the locative call.

We shall also expect to show by the evidence, that there were no rapids in the River Des Moines, then called, or entitled to be called, on account of position or magnitude, "the rapids of the River Des Moines."

*665 These facts being established, we will insist that the * notorious object bearing the name used in the locative call, and every way satisfying the call, must be taken in law to be the object called for; and that the centre of "the rapids of the River Des Moines" in the Mississippi is the point over which the line of latitude marking the boundary of the State of Missouri must run.

1st. We will show by public acts, and by numerous witnesses, the position

of "the rapids of the River Des Moines"; that they are the same with the lower or Des Moines rapids of the Mississippi, and that those rapids were in 1820, and prior thereto, well known by the name of "the rapids of the River Des Moines" in English, and "les rapides de la Rivière Des Moines" in French.

2d. We will infer from the language of the constitution itself, and the then existing knowledge of the country, that "the rapids of the River Des Moines" were called for in the constitution merely to fix the parallel of latitude on which the boundary-line was to run, and were not supposed to be touched by that line.

3d. We will show by actual survey, as well as by general evidence, that there are no rapids in the Des Moines entitled to the general descriptive appellation of "the rapids of the River Des Moines."

4th. And we will insist that in 1820 there were no rapids in the Des Moines River known as "the rapids of the River Des Moines."

5th. We will contend, that the State of Missouri has failed to prove a general understanding or opinion in Congress and in the convention counter to what we have shown to be the obvious construction of the act of Congress and of the constitution of Missouri, when taken in connection with the well-established facts.

6th. We will contend, that the evidence on the part of Missouri shows that all, or nearly all, of the members of the convention, and other witnesses who supposed, or now think they supposed, the rapids named in the constitution were in the Des Moines River, knew nothing of any particular rapids to which the constitution referred; but that their impression was vague and general, fixing on no actual known or existing object.

7th. We will show that the evidence which tends to give to rapids in the Des Moines River a distant locality and name is insufficient and unsatisfactory, and that in the aggregate it applies as well to the Sweet Home or the Farmington rapids, as to the rapids of the Big Bend.

8th. We will insist that the rapids at St. Francisville and the rapids at
*666 Farmington are each and either of them better * entitled to the appellation of "the rapids of the River Des Moines," than the rapids at the Great Bend,—the first because of its position, the second because it is the greater rapid. And that the rapids at Sweet Home conform better than those at the Great Bend to the locative calls in the constitution, and to contemporaneous opinion and usage. Fall at Great Bend, in 87 rods, 1.80 feet. Fall at Farmington, in 87 rods, 2.05 feet.

9th. If we succeed in maintaining these propositions, we establish as matters of fact, that the lower rapids of the Mississippi were the object, and the only object, which, in 1820, bore in English the name used in the constitution, "the rapids of the River Des Moines," and in French the name used in the translation, "les rapides de la Rivière Des Moines." And that, at that time, they had notoriety in both languages by those names, and that they every way satisfy the locative call.

10th. And these facts being established, we will contend that those rapids are, and must be held in law to be, the object called for; and that the centre of that object, namely, the centre of "the rapids of the River Des Moines" in the Mississippi, is the point over which the line of latitude must be drawn which shall mark the northern boundary of the State of Missouri.

Mr. Justice CATRON delivered the opinion of the court.

On the 10th day of December, A. D., 1847, the State of Missouri filed her original bill in this court, according to the third article and second section of the Constitution, against the State of Iowa, alleging that the northern part of said

State of Missouri was obtruded on and claimed by the defendant, for a space of more than ten miles wide and about two hundred miles long; and that the State of Missouri is wrongfully ousted of her jurisdiction over said territory, and obstructed from governing therein; that the State of Iowa has actual possession of the same, claims it to be within her limits, and exercises jurisdiction over it, contrary to the rights of the State of Missouri, and in defiance of her authority.

And the complainant prays, that, on a final hearing, the northern boundary-line of said State of Missouri (being the common boundary between the complainant and defendant) be, by the order of this court, ascertained and established; and that the rights of possession, jurisdiction, and sovereignty to all the territory in controversy be restored to the State of Missouri; that she be quieted in her title thereto; and that the defendant, the State of Iowa, be for ever enjoined and restrained from disturbing the State of Missouri, her officers
*667 and people, * in the full possession and enjoyment of said territory, thus wrongfully held by the State of Iowa.

To this bill the State of Iowa answers. She denies the right claimed by Missouri; alleges that Iowa has the sovereign authority to govern and hold the territory in dispute as part of her territory, the common line dividing the States being the southern part thereof; and also prays, that the rights of the parties may be speedily adjudicated by this court, that the relief prayed by complainant may be denied, and that her bill be dismissed.

To the bill of Missouri Iowa files her cross-bill, charging Missouri with seeking to encroach on the territorial limits of Iowa to the extent aforesaid, and more; prays, that, on a final hearing, a decree be made by this court, settling for ever the true and rightful dividing line between the two States; that Iowa may be quieted in her possession, jurisdiction, and sovereignty up to the line she claims; and that the State of Missouri be perpetually enjoined from exercising jurisdiction and authority, and from disturbing the State of Iowa, her officers and people, in the enjoyment of their rights on the north side of the true line.

To this bill the State of Missouri answers, and sets up in defence the same matters set forth by her original bill.

Replications were filed to both answers. On these issues depositions were taken, on which, together with much of historical and documentary evidence, the cause was brought on to a hearing, and was heard with a most commendable spirit of liberality on both sides. And we take occasion here to say, on a matter of practice, that bill and cross-bill is deemed the most appropriate mode of proceeding applicable to cases like the present, as it always offers an opportunity to the court of making an affirmative decree for the one side or the other, and of establishing by its authority the disputed line, and of having it permanently marked by commissioners of its own appointment, if that be necessary, as in this cause it is.

The present controversy originated in 1837, between the United States and the State of Missouri, and was carried on for ten years before Iowa was admitted as a State. Previous to the controversy, and after Missouri came into the Union, in 1821, many acts had been done by both parties most materially affecting the controversy, and tending to compromit the claims now set up, on the one side as well as the other. The new State of Iowa came into the Union, December 27, 1847, and up to this date she was bound by the acts of her predecessor, the United States, forasmuch as the latter might have directly conceded to Missouri a new

boundary on the north, as was done on the west; and so, likewise, Iowa is
*668 bound by the * acts and admissions of the United States, tending indirectly to confirm and establish a particular line as the northern boundary of Missouri. And to ascertain how far the United States government was committed by acts to a particular line, a brief historical notice is necessary, showing how jurisdiction has been exercised in the country west of the Mississippi River. It was acquired in 1803, and in 1804 the Territory of Orleans and District of Louisiana were divided, the latter then embracing what is now the State of Missouri, and much more. In 1805, the District of Louisiana was erected into a separate territorial government, the name of which was changed to Missouri, on the State of Louisiana being created, in 1812, that State having adopted the name of Louisiana. In 1819, the Territory of Arkansas was formed from the southern part of the Missouri Territory; the lines of division being the same that now divide the States of Missouri and Arkansas.

In 1818, the inhabitants of Missouri Territory petitioned Congress that it might be admitted into the Union as an independent State. They set forth the boundaries which they desired that the new State should have, with the reasons favorable to the boundaries desired. They alleged that the petitioners resided in that part of the territory which lies between thirty-six degrees and thirty minutes and forty degrees north, and between the Mississippi River east, and the Osage boundary-line west; and they prayed to be admitted into the Union of the States within these limits. The petitioners further declared, that "the boundaries which they solicit for the future State they believe to be the most reasonable and proper that can be devised. The southern limit will be an extension of the line that divides Virginia and North Carolina, Tennessee and Kentucky. The northern will correspond nearly with the north limit of the territory of Illinois, and *with the Indian boundary-line, near the mouth of the River Des Moines.* A front of three and a half degrees upon the Mississippi will be left to the South, to form the Territory of Arkansas, with the River Arkansas traversing its centre. A front of three and a half degrees more, upon a medium depth of two hundred miles, with the Missouri River in the centre, will form the State of Missouri. Another front of equal extent, embracing the great River St. Pierre, will remain above, to form another State at some future day. The boundaries, as solicited, will include all the country to the north and west to which the Indian title has been extinguished. They will include the body of the population."

The two Indian boundary-lines referred to (as "the Osage or Indian
*669 boundary") were run in pursuance of a treaty made * in 1808, between the United States and the Great and Little Osage nations, by which it was stipulated that the Osage boundary should begin at Fort Clark, standing on the south bank of Missouri River, about twenty-three miles below the mouth of the Kansas, thence running due south to the Arkansas River, and with it to its mouth; thereby ceding to the United States all lands lying east of said line, and north of the southwardly bank of the Arkansas. The treaty also ceded "all lands belonging to the Osages situated northwardly of the River Missouri." The boundary-lines were to be run and marked as soon as the circumstances and convenience of the parties would permit. And the Great and Little Osages promised to depute two chiefs from their respective nations to accompany the commissioner or commissioners who might be appointed by the United States to settle and adjust the said boundary. The war of 1812 seems to have hindered a survey of the lines,

as, in 1815, by another treaty, peace was reestablished between the contracting parties, and former treaties were renewed, and in 1816 John C. Sullivan was sent by the United States to run the lines north of the Missouri River. The Osages, by the treaty of 1808, having surrendered all claim to territory north of the Missouri River, it became necessary that they should show to the United States what part of that country they owned, so that it might be separated, by a defined boundary, from other Indian territories. Sullivan, the surveyor, commenced his first line on the north bank of the Missouri, opposite to the middle of the mouth of the Kansas, and ran north one hundred miles, made a corner, and then ran east to the River Des Moines, about one hundred and fifty miles more, west of the first line, and north of the second. The entire country was then claimed, and partly occupied, by different nations of Indians. In 1816, also, Joseph C. Brown ran the line from Fort Clark south to the Arkansas River, in execution of the treaty of 1808. And the lines run by Brown and Sullivan are "the Indian boundary" referred to in the foregoing petition of the inhabitants of Missouri Territory.

In March, 1818, the petition was referred to a select committee; and on March 6th, 1820, an act of Congress was passed, pursuant to the petition, authorizing the people of Missouri Territory to form a constitution and State government within the limits designated by the act; that is to say,—"Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west along the said parallel of latitude to the St. François River;

*670 thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and * thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River; thence, from the point aforesaid, north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary-line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said River Des Moines; thence down along the middle of the main channel of the said River Des Moines to the mouth of the same, where it empties into the Mississippi River; thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning."

According to this law, the people of the Territory, in 1820, proceeded to form a constitution, by which the boundary prescribed by the act of Congress was adopted; and by resolution of March 2, 1831, the State was admitted to enter the Union on certain conditions, to which she assented in June, 1821. On the north and west, as already stated, the new State bordered on Indian territory, over which the general government exercised that modified jurisdiction which existing Indian rights would allow, and had the exclusive power to extinguish the Indian title. The boundaries were therefore common to the two governments, and the acts of either, when exercising jurisdiction with respect to the common boundary, become proper subjects of consideration in the present controversy, as either government might bind itself to a practical line, although not a precisely true one, within the foregoing description. And in pursuing this branch of the

subject, our first inquiry will be, how far the general government has committed itself to the old Indian boundary. Its action has been, first, through the Indian department; secondly, through the surveyor's department; and thirdly, by the exercise of civil jurisdiction in the territorial form of government on the north of Sullivan's line, embracing the territory now in controversy.

And, first, as to Indian treaties. The earliest one materially bearing on the question was that of August 4, 1824, with the Sac and Fox tribes. They ceded to the United States all the title and claim that they had to any lands within the limits of the State of Missouri, "which are situated, lying, and being be-
*671 tween the Mississippi and Missouri Rivers, and a line * running from the Missouri, at the entrance of the Kansas River, north one hundred miles to the northwest corner of the State of Missouri, and from thence east to the Mississippi; reserving to the half-breeds of said tribes the small tract in the fork between the Mississippi and Des Moines Rivers, and south of the said line." The Indian tribes admitted that the land east and south of the given lines belonged to the United States, and that none of their people should be permitted to settle or hunt on it. Although the Osages had, in part, ceded the same country in 1808, still the Sacs and Foxes set up a claim to part of it, and the treaty of 1824 was made to quiet their claim.

June 3, 1825, the Kansas tribe also ceded to the United States all claim they had to any lands in the State of Missouri, and further ceded and relinquished all other lands which they then occupied, or to which they had title or claim, "lying west of the said State of Missouri, and within the following boundaries: beginning at the entrance of the Kansas into the Missouri River; from thence north to the northwest corner of the State of Missouri," thence north and west. Of course, the northwest corner here referred to was the one made by Sullivan in 1816, as none other was then claimed by Missouri herself, nor known to the United States or the Indians.

In February, 1831, the State of Missouri, by a memorial from the legislature to Congress, petitioned the United States for an addition of the country west of the line running from the mouth of the Kansas north, and between said line and the Missouri River, alleging that it was a small slip of land that had been acquired, by the treaty of June 3d, 1825, from the Kansas Indians. The petition declared, that the line from the mouth of the Kansas north was about one hundred miles long; that the country was settled, and rapidly settling, to its utmost verge; and that, as the Missouri River was the only great highway of this region, and could not be reached through a country inhabited by Indians, and being without roads, a cession of it to that State was necessary and proper.

June 7, 1836, Congress acceded to the request of Missouri, and granted to that State all jurisdiction over the lands lying between its then western line and the Missouri River, making the river the western boundary. But the accession was not to take effect until the Indian title to the country was extinguished.

By the treaty of July 15, 1830, ten confederated tribes conjointly ceded a large tract of country to the United States, the boundary of which began near the head of the Des Moines River, and passed westwardly to the north of the principal rivers falling into the Missouri, and down Calumet River to the
*672 Missouri, and down the same to the Missouri State line at the * mouth of the Kansas; thence along said State line to the northwest corner of the State; and then northwardly and eastwardly various courses to the place of be-

ginning. And within this boundary the tribes were to be located and superintended by the United States, pursuant to a policy now generally prevailing, and by which the Indians east of the Mississippi River had been removed west of it. By this treaty, the neck of land between the Missouri River and the then western line of Missouri was appropriated for the benefit of these tribes. To remove this impediment, and gratify the request of the State to have her limits enlarged, a treaty was made on the 17th of September, 1836, with the Iowas, Sacs, and Foxes, reciting the facts, so far as the Indians were interested, and also that it was desirable and necessary that the country should be attached to the State of Missouri; and thereupon these Indian tribes (being part of the ten) did cede and relinquish to the United States all their right and interest to the lands lying between the State of Missouri and the Missouri River; and the United States were exonerated from the guaranty imposed on them by the treaty of 1830, known as the Treaty of Prairie du Chien. And on the 27th of September, 1836, another band of the Sac and Fox tribes made a similar cession. And on the 15th of October, 1836, various bands of the Sioux, by another treaty, also assented to the cession, but in more definite terms: they gave a quitclaim to the United States of their interest in the lands "lying between the State of Missouri and the Missouri River, and south of a line running due west from the northwest corner of the State to the Missouri River." The country having been disencumbered of the Indian title, the President, by proclamation of March 28, 1837, declared that the act of Congress of June 7, 1836, should take effect; and thereby the ceded territory became a part of the State of Missouri.

There are, in all, fifteen Indian treaties referring to the Osage boundary of 1816, as run by Sullivan, each of which recognizes that boundary as the Missouri State line; and all of which treaties were made after Missouri was admitted into the Union, and before Iowa became a State. And as the treaties were drawn by authority of the United States, they must be taken as recognitions, on the part of the general government, that the Missouri boundary and the old Indian boundary are identical.

In the second place, it is proper to inquire how far the general government has recognized the Indian boundary-line of 1816 in its land department. By the act of February 17, 1818, the Howard District was established. This ex-
*673 tended west to the old Indian boundary, and ran with it from the * mouth of the Kansas north, through its whole length, and thence east with Sullivan's line to where it intersected the range line ten west from the principal meridian; extending on the east line about four-fifths of its length.

In 1823 this district was divided, and a western one established fronting on the two lines.

To the eastern part of Sullivan's line, next to the Des Moines River, the St. Louis District extended until 1824, when the Salt River District was established, running west to the range line between ranges 13 and 14; thence north to the northern boundary-line of the State of Missouri; thence east with the State line to the River Des Moines, and down the same with the State line.

By the act of August 29, 1842, the western land district was divided, and that part of it lying north of the Missouri River had attached to it the Platte country; that is to say, the country annexed to Missouri by the act of Congress of 1836, lying west of the old Indian boundary, and next to the Missouri River.

When acting through the surveyor's department of public lands, on the Mis-

souri side, the general government has never recognized on the north, nor, until the Platte country was attached, on the west, any boundary as belonging to that State other than the two Indian lines run by Sullivan in 1816, so far as they extended.

The country north of the State of Missouri was for a time attached to the Territory of Michigan, and then to the Territory of Wisconsin. By the act of June 12, 1838 (ch. 96), it was formed into a separate territorial government, by the name of Iowa. And by another act of the same date (ch. 100), the territory was formed into two land districts, the southern one embracing the country in dispute.

And on the Iowa side, the public surveys were executed, and lands were sold, up to Sullivan's northern line. Nor had the Surveyor-General of Illinois and Missouri any jurisdiction to go beyond it north; nor the surveyor's department of Iowa, to cross it by surveys to the south. From the time that Missouri became a State to this day, Sullivan's line has been recognized by the United States as the true northern boundary of Missouri, so far as it could be done through the department of public lands.

And thirdly, Congress, as early as 1834, organized a territorial government bounded by said line; laid off counties bounded by it on the south, as early as 1836; and governed the territory for ten years up to that line,—all the time recognizing it as the proper northern boundary of Missouri.

*674 * From these facts it is too manifest for argument to make it more so, that the United States were committed to this line when Iowa came into the Union. And, as already stated, Iowa must abide by the condition of her predecessor, and cannot now be heard to disavow the old Indian line as her true southern boundary.

The State of Iowa, by her cross-bill, alleges that Missouri also treated the old Indian boundary as her true northern line, until about the year 1836; and that said line, at its western extremity, is about six miles north of the parallel of latitude which is the proper dividing line between the two States, and that, at its eastern extremity, it is about ten miles north of the same; that the parallel of latitude on which the line should run is found at a point opposite the *middle* of the rapids in the Mississippi River known as "the Des Moines Rapids." This rapid begins about three miles above the mouth of the Des Moines River, and extends up the Mississippi about fourteen miles. It is a highly notorious geographical object, and a very proper one to govern a national boundary; but the name called for in the act of Congress of 1820, and in the constitution of Missouri, is "the rapids of the River Des Moines." Then, and ever since, the great rapid in the Mississippi River has been known by a different name. It is therefore left uncertain whether the rapid in the Mississippi was the one referred to; and the obscurity is greatly increased by a most embarrassing disagreement among the witnesses testifying on this head.

The name given in the act of Congress, taken in connection with its context, would assuredly apply to a rapid in the Des Moines River, if a notorious one existed, as the Mississippi River is not mentioned in the call, and the Des Moines is; nor was the Mississippi River to be reached by that line. Then, again, the rapid is fourteen miles long, and no part of it is called for as an opposite point to found the line upon.

It therefore follows, that the claim of Iowa to come south to the middle of the

rapid throws us on a doubtful and forced construction of the instrument under consideration; and such a construction we are not willing to adopt, even if Iowa could at this day set up a claim to its adoption, which, for the reasons above stated, we think she cannot be allowed to do.

The State of Missouri, by her bill, disavows the old Indian boundary, and utterly denies that the great Des Moines rapid in the River Mississippi is the object called for in her constitution. She insists that the true rapids are found in the Des Moines, and that her northern line has been run and marked
*675 * from the true rapids, west to the Missouri River. The history of this line is as follows:—In December, 1836, the legislature of Missouri passed an act requiring the northern boundary of that State to be surveyed and marked under the direction of the executive; and in June, 1837, the governor appointed three commissioners to execute the law, who acted under special instructions from the executive. The commissioners appointed Joseph C. Brown their engineer and surveyor, and commenced the work in July following; and after having examined the Des Moines, from a point nearly one hundred miles up the river, downwards to its mouth, to ascertain the true rapids called for in the State constitution, determined on the proper place where, in their judgment, the line should begin; and from that place the line was run and marked due west to the Missouri River; and this is known as Brown's line. It lies about ten miles north of the old Indian boundary. And, by an act of the legislature of Missouri, passed 11th February, 1839, the line so run and marked by Brown was declared to be the northern boundary-line of said State, and has been claimed by her as such since that time.

On the rapids selected by the commissioners, and on Brown's line, the bill of complaint of the State of Missouri is altogether founded; and if she fails in establishing the proper place of beginning, she has no case, and must go out of court as a complainant, and can have no relief further than an injunction to restrain Iowa from obtruding on her jurisdiction south of the true line, wherever it may be found, should Iowa attempt to go south of such line.

The main question arising on the original bill of the State of Missouri therefore is, whether any rapid exists in the Des Moines River of such a prominent character as to correspond to the call in her constitution of "THE RAPIDS OF THE RIVER DES MOINES." On this branch of our inquiries we are furnished with highly satisfactory evidence. By the act of August 8, 1846, the Iowa Territory had granted to it, by Congress, every alternate section of land not then disposed of lying in a strip of five miles wide on each side of the Des Moines River, for the improvement of the same from its mouth to a long distance up, and which grant was to accrue to the benefit of the State when she should come into the Union. To carry into effect the act of Congress, a board of public works was organized for the improvement of the river. They employed an engineer to survey and level it with a view to slack-water improvements, and it was surveyed from its mouth for ninety-three miles upwards. The engineer had every advantage of suitable instruments, low water, and ice in the winter, and no
*676 doubt exists of * his accuracy when performing the field operations and in making the levels.

The first ripple he came to, worthy of notice here, was twenty-four miles from the mouth of the river; and, on eighty rods of its greatest descent, he found .73 foot fall.

On the 26th mile is "Sweet-home Ripple." There was found a fall of .85 feet in eighty rods.

On the 34th mile, at Farmington, he found a fall of 2.27 feet in ninety-six rods, and in eighty rods 1.89 feet.

On the 42d mile, he found a ripple (near Benton's Port) of 1.26 feet fall in sixty rods, and 1.68 in eighty rods.

On the 51st mile, being at the great bend, where Brown's line commences, the engineer found a fall of 1.75 feet in eighty rods,—that is to say, twenty-one inches. Brown had also taken a level there of a space of some sixty rods, in August, 1837, and found a fall in that distance of 1 foot 9⅜ inches; but his instruments were not so reliable. The bottom of the river is rock at that place, and there is a thin stratum at one point, over which the water breaks when the river is low.

On the 53d mile, a fall was found in eighty rods of 1.75 feet by the engineer of Iowa.

On the 55th mile, a fall of 1.81 feet was found in eighty rods.

On the 93d mile, a fall was found in eighty rods of 2.10 feet.

A line extended due west from this greatest fall would lie about twenty miles north of Brown's line, the river being very crooked. From this point downwards, it was examined by the commissioners of Missouri in 1837.

The shoals on the 34th mile, at Farmington, on the 42d, at Benton's Port, and at the great bend at Van Buren, on the 51st mile, where Brown's line begins, and the descents on the 53d and 55th miles, are of about equal magnitude; neither reach to so much as two feet ascent in eighty rods, and are not perceptible at all when the water is three feet higher than when at its lowest stage in dry weather. In 1820 these shoals were nameless, and are so slight that some of them are now nearly obliterated by the accidents of dams thrown across the river for milling purposes. Either one of the five might have been selected by the commissioners of Missouri for the proper place of beginning with almost equal propriety. They searched the river from the Appannoose Fall, at the 93d mile, to its mouth, in a pirogue, before they selected their starting-point, obviously depending on such examination for a selection of the particular place of beginning, and not on any notorious rapid pointed out by public reputation. There is none such in the Des Moines River, and therefore Brown's line cannot be upheld, nor the claim of Missouri be supported.

*677 * This court is, then, driven to that call in the constitution of Missouri which declares that her western boundary shall correspond with the Indian boundary-line; and, treating the western line of a hundred miles long as a unit, and then running east from its northern terminus, it will supply the deficiency of a call for an object that never existed. Nor has Missouri any right to complain. She herself, for ten years and more after coming into the Union, recognized the Indian lines west and north as her proper boundary; her counties were extended up to these lines before the present controversy arose; and so counties in the territory north were established up to this recognized line without objection on the part of Missouri. And when Congress ceded to Missouri the country west of Sullivan's line, both parties to that cession acted on the assumption, that the ceded territory next the Missouri River was bounded on the north by a line that should be run due west from the northwest corner of the old Osage boundary. To this extent the Indian title was extinguished, and to no other ex-

tent did the United States cede that country. Nor could this court act otherwise than to reject the claim of Missouri, without doing palpable injustice to the United States on the western part of the line.

We are, therefore, of opinion, that the northern boundary of Missouri is the Osage line, as run by Sullivan in 1816, from the northwest corner made by him to the Des Moines River; and that a line extended due west from said northwest corner to the Missouri River is the proper northern boundary on that end of the line. And this is the unanimous opinion of all the judges.

Decree.

On this 13th day of February, A. D. 1849, the cause of the State of Missouri against the State of Iowa, on an original bill, and also on a cross-bill of the State of Iowa against the State of Missouri, constituting part of said cause, came on to be heard before the honorable the judges of the Supreme Court of the United States in open court, all the judges of said court being present. And said cause was heard on the original bill, and the answer thereto, and the replication to said answer; and also on said cross-bill, and the answer thereto, and the replication to said answer; and on the proofs in said cause, consisting of depositions, documents, and historical evidences; when it appeared to the court, that, in the year 1816, the United States caused to be run and marked two lines, as part of a boundary between the United States and the Great and Little Osage nations of Indians,
*678 in execution of a treaty made * with said Osages in 1808, the first line of the two beginning on the eastern bank of the Missouri River, opposite the middle of the mouth of the Kansas River, and extending north one hundred miles, where a corner was made by John C. Sullivan, the surveyor and commissioner, acting on behalf of the United States and the Osage nations; and that from said corner a second line was then run and marked by said surveyor, under said authority, which was intended to be run due east, on a parallel of latitude, but which line, by mistake, varied about two and one-half degrees towards the north of a due east and west line. And it further appeared, that the first-named line is the one to which the descriptive call in the constitution of the State of Missouri refers as the Indian boundary-line, and to which the western boundary of said State was to correspond. And it also appeared, that said two lines had, at all times since Missouri came into the Union as a State, been recognized by the United States as the true western and northern boundaries of the State of Missouri, as called for in her constitution; and that the State of Missouri had also recognized these lines as a part of her boundary for the first ten years of her existence, if not more; but that, in the year 1837, she caused another line to be run, and marked as her northern boundary, from the River Des Moines due west to the Missouri River, lying about ten miles north of said line run by Sullivan in 1816, which line of 1837 embraced part of a territory then governed by the United States, and which was inhabited by citizens of the United States, and which territory continued to be so governed by the United States until the 29th day of December, 1846, when the jurisdiction over the same was conferred upon the State of Iowa. It further appeared, that the State of Missouri claims to exercise jurisdiction up to said line, as run and marked in the year 1837, on an assumption that the descriptive call in her constitution for a parallel of latitude "passing through the rapids of the River Des Moines" was gratified by a rapid

found in said river, at a place known as the Great Bend, and from which said line was begun and extended west. And this court finds that there is no such rapid in the River Des Moines as that called for in the constitution of the State of Missouri; and that she was not justified in causing the line run and marked in 1837 to be extended as her northern boundary.

And the court further finds, that the State of Iowa is estopped from setting up claim to a line south of the old Indian boundary, known as Sullivan's line, as said State, by her cross-bill, assumes to do; because her predecessor, the United States, by many acts, and by uniform assumptions, up to the time when
*679 * Iowa was created, in December, 1846, recognized and adopted Sullivan's line as the proper northern boundary of the State of Missouri; and that the State of Iowa is bound by such recognition and adoption.

And it further appeared, that that portion of territory lying west of Sullivan's first line, and between the same and the Missouri River, was added to the State of Missouri by force of an act of Congress of June 7th, 1836, which took effect by the President's proclamation of March 28th, 1837; and that a line prolonged due west from Sullivan's northwest corner, on a parallel of latitude, to the middle of the Missouri River, is the true northern boundary of the State of Missouri, on this part of the controverted boundary.

And this court doth therefore see proper to decree, and doth accordingly order, adjudge, and decree, that the true and proper northern boundary-line of the State of Missouri, and the true southern boundary of the State of Iowa, is the line run and marked in 1816, by John C. Sullivan, as the Indian boundary, from the northwest corner made by said Sullivan, extending eastwardly, as he run and marked the said line, to the middle of the Des Moines River; and that a line due west from said northwest corner to the middle of the Missouri River is the proper dividing-line between said States west of the aforesaid corner; and that the States of Missouri and Iowa are bound to conform their jurisdictions up to said line on their respective sides thereof, from the River Des Moines to the River Missouri.

And it is further adjudged and decreed, that the State of Missouri be, and she is hereby, perpetually enjoined and restrained from exercising jurisdiction north of the boundary aforesaid dividing the States; and that the State of Iowa be, and she hereby is, also perpetually enjoined and restrained from exercising jurisdiction south of the dividing boundary established by this decree.

And it is further ordered, that Joseph C. Brown, of the State of Missouri, and Henry B. Hendershot, of the State of Iowa, be, and they are hereby, appointed commissioners to find and re-mark the line run by said Sullivan in 1816, extending eastwardly from said northwest corner to the Des Moines River; and especially to find and establish said northwest corner, and to mark the same as hereinafter directed; and also to run a line due west, on a parallel of latitude, from said corner, when found, to the Missouri River, and to mark the same as hereinafter directed.

And said commissioners are hereby commanded to plant at said north-
*680 west corner a cast-iron pillar, four feet six inches * long, and squaring twelve inches at its base, and eight inches at its top; such a pillar to be marked with the word "Missouri" on its south side, and "Iowa" on the north, and "State Line" on the east side; which marks shall be strongly cast into the iron. And a similar pillar shall be by them planted in the line near the bank of

the Des Moines River, with the mark of "State Line" facing the west. And also a similar one, near the east bank of the Missouri River, shall be planted by the said commissioners in the said line, the mark of "State Line" facing the east.

And it is further ordered, that pillars or posts, of stone or of cast-iron, shall be planted at every ten miles in the line extending east, from the northwest corner aforesaid to the Des Moines River; and also at the end of every ten miles on the due west line, extending to the Missouri River from said corner. These latter line-posts to be of such description as the commissioners may adopt, or as the parties to this suit, acting jointly, may direct the commissioners to use, except that said line-posts shall be of stone or iron.

And it is further ordered, that a duly certified copy of this decree shall be forwarded to the chief magistrate of the State of Missouri, forthwith, by the clerk of this court; and that a similar copy shall, in like manner, be forwarded to the chief magistrate of the State of Iowa. And the commissioners of this court hereby appointed are directed to correspond with said chief magistrates respectively, through their secretaries of state, requesting the coöperation and assistance of the State authorities in the performance of the duties imposed on said commissioners by this decree.

And it is further ordered, that the clerk of this court forward to each of the said commissioners a copy hereof, duly authenticated, without delay.

And it is further ordered, that said commissioners make report to this court, on or before the first day of January next, of their proceedings in the premises, with a bill of costs and charges annexed.

And it is further ordered, that, should either of said commissioners die, or refuse to act, or be unable to perform the duties required by this decree, the chief justice of this court is hereby authorized and empowered to appoint other commissioners to supply vacancies; and, if it be deemed advisable by the chief justice, he may increase the commissioners, by appointment, to more than two; and he is authorized to act on such information in the premises as may be satisfactory to himself.

*681 And should any other contingencies arise in executing this * decree, the chief justice, in vacation, is further and generally authorized to make such orders and give such instructions as this court could do when in session. Copies of all orders and instructions and acts done in the premises by the chief justice shall be filed by the clerk of this court, together with the petitions, papers, and documents on which they are founded. And reports of the commissioners, if made in vacation, shall be filed with the clerk also, for safe-keeping thereof, until presented in open court for its action thereon.

And it is further ordered and adjudged, that the costs of this suit, including the original bill, cross-bill, and the proceedings thereon, and all costs incident to establishing and marking the dividing line, and all other costs and charges of every description, shall be paid by the States of Iowa and Missouri equally.

In the case of Missouri *v.* Iowa, and of Iowa *v.* Missouri, in the Supreme Court of the United States:

Having received information of the death of Joseph C. Brown, one of the commissioners appointed by the decree of the Supreme Court in the above-men-

tioned cases to run and mark the boundary-line between the States of Missouri and Iowa, I hereby, pursuant to the duty enjoined upon me by the said decree, appoint Robert W. Wells, of the State of Missouri, a commissioner for the purposes aforesaid, in the place of the said Joseph C. Brown, deceased.

R. B. TANEY,
Chief Justice of Supreme Court of U. S.

Baltimore, April 6, 1849.

State of Missouri, Complainant, v. State of Iowa, Respondent.
Original Bill.

State of Iowa, Complainant, v. State of Missouri, Respondent.

Supreme Court of the United States, 1850.

[10 *Howard,* 1.]

The report of the commissioners appointed by this court in 7 Howard, 660, to run and mark the line dividing the States of Missouri and Iowa, adopted and confirmed, and the boundary line finally established.

THE commissioners appointed by this court to run and mark the boundary line between said states, according to our decree of the December term, 1848, having performed that duty, and reported to the court at this term the manner in which said work had been performed: and it appearing that two surveyors had been employed by said commissioners to aid them in doing the work in the field; and that other assistants had been employed, and that various expenses had been incurred in running and marking said line: now, in order that the parties to said controversy may be informed of the amount of means necessary to be provided to pay for said services, and also for other costs and charges, incident to the suit, it is ordered that the clerk of this court do examine witnesses, and resort to other evidence, for the purpose of ascertaining what is the proper compensation to be allowed to said commissioners and the surveyors they employed; and also what compensation is due to the Hon. Robert W. Wells for such services as he may have performed as commissioner before he resigned. And said clerk will also ascertain the amount of expenses, of every description, incurred by said commissioners, besides the compensation to themselves and said surveyors, together
*2 with the costs and charges incurred in this court in carrying on the * controversy here. All of which he will include in a detailed account, and report the same to this court at an early day, for its final action thereon.

And in taking said account, the report of said commissioners will be taken as *primâ facie* true.

Said clerk will also ascertain and report the amount of moneys already advanced to said commissioners by the States of Missouri and Iowa respectively; and the manner in which said moneys have been expended.

12 *December,* 1850.

And now, on this third day of January, A. D. 1851, this cause came on for further order and decree therein, when it appeared to the court that at the December term, 1848, thereof, Henry B. Hendershott and Joseph C. Brown were appointed commissioners to run and mark the line in controversy between the States of Missouri and Iowa; and the said Brown having died, the Hon. Robert W. Wells was appointed in room and stead of said Brown by the Chief Justice of this court, in vacation. And said Wells having resigned his appointment, William G. Minor was appointed commissioner in room and stead of said Wells, by this court, at its last December term of 1849; and at which term the time for running and marking said line was extended to this present term of December, 1850, for the reasons stated in the report of said Wells and Hendershott, made to the last term; and which is hereinafter embodied. And the present commissioners, Henry B. Hendershott and William G. Minor, have made their report, in the premises to this term; and which report is as follows:—

To the Honorable the Supreme Court of the United States.

The undersigned, appointed commissioners by this honorable court, in the above cases, to establish the boundary line between the aforesaid States, respectively report, that, for the purpose of arranging the operations in the field so as to combine economy with speed, we met in the city of St. Louis, in March last, and there, after consulting experienced surveyors as to the time that might be consumed in running the line, the probable amount of expense to be incurred, the necessary force to be employed, and the proper outfit, we determined a plan of operations, and agreed to meet at the supposed site of Sullivan's "northwest corner," between the 1st and 20th of April last. While in St. Louis, we obtained from Major M. L. Clark, Surveyor-General of the States of Missouri and
*3 Illinois, a copy of the field notes of the survey made by John C. * Sullivan, in the year 1816, of a line beginning on the east bank of the Missouri River, opposite the middle of the mouth of the Kansas River, and extending north one hundred miles, where he made a corner, and also of the line run by him in an easterly course to the Des Moines River. We were also furnished by Major Clark with several charts, diagrams, and copies of surveys which had at various times been made of portions of Sullivan's line, and which were of much service in the prosecution of the work.

The surveyors severally appointed by us were William Dewey, Esq., of Iowa, and Robert Walker, Esq., of Missouri. Both these gentlemen had been connected with the public works of their respective States, and enjoy a high professional reputation.

According to our agreement, we left our respective homes on the 10th of April last, and soon after reaching the point of meeting, in view of increased prices of transportation, provisions, &c., caused by the immense emigration through Southern Iowa and Northern Missouri to California, we altered our plan of work and reduced our force.

No precise trace of the "old northwest corner" remained,—the witness-trees to it were on the margin of a vast prairie, and had apparently been destroyed by fire years ago. Consequently its exact position could not be ascertained. Yet from the running of many experimental lines, diligently examining the evidences

before us, together with the reports of the surveyors, we became satisfied of its proper position, and accordingly established it.

Its latitude taken resulted as follows:—

40° 34′ 40″ N.

At the corner so determined we planted a large, solid cast-iron pillar, weighing between fifteen and sixteen hundred pounds, four feet six inches long, squaring twelve inches at its base and eight inches at its top. This pillar was deeply and legibly marked with the words (strongly cast into the iron) "Missouri" on its south side, "Iowa," on its north side, and "State Line" on the east.

From the monument so planted at the "northwest corner" aforesaid, in the said latitude, the survey of the line was commenced, running due west on said parallel of latitude to the Missouri River, as directed by this honorable court, and at its terminus, as near the bank of said Missouri River as the perishable nature of the soil would admit, we planted a monument similar in figure, weight, dimension, and inscription to the one planted at the "northwest corner," the words "State Line" facing the east.

*4 * Unexpected delays, arising from a condition of the weather which prevented the surveyors from making reliable astronomical observations, together with the fact, that, to a great extent, in the vicinity of said line there were no roads, and the settlements distant and sparse, compelling us to open a track for the transportation of the monuments and baggage of the corps, and also to construct necessary bridges and grade fords, greatly retarded the work.

Returning to the "northwest corner," the survey of the line was commenced, extending eastwardly from said "corner" to the Des Moines River, as run and marked by said Sullivan, in 1816, from said corner to said river. On this line, by close examination, we discovered abundant blazes and many witness-trees, which enabled us to find and re-mark the said line, as directed by this honorable court.

The survey of this portion of the line, more than one hundred and fifty miles in length, was commenced on the 13th day of August, and finished on the 18th of September.

Near the bank of the Des Moines River where the line terminated, we planted a cast-iron pillar, similar in weight, figure, dimensions, and inscriptions to those planted at the "northwest corner," and near the bank of the Missouri River, the words "State Line" facing the west.

Solid pillars of cast-iron, weighing each between three and four hundred pounds, and minutely described as to figure and inscriptions in the report heretofore made to this honorable court by Messrs. Wells and Hendershott, commissioners, we caused to be planted at every ten miles, in the due west line extending from said "northwest corner" to the Missouri River, and also at every ten miles in the line extending east from the "northwest corner" aforesaid to the Des Moines River.

No iron monument was planted at mile 150 in the line running east, because between it and the point where the large one is planted on the bank of the Des Moines River there existed but a small fraction of ten miles, being only fifty-one chains.

For a fuller account of the said survey we respectively refer to the report

of the surveyors made to us, marked A; and to the following exhibits herewith transmitted:—

Field notes of said survey, accompanied by a map of the line (marked B).

Tabular statement of the costs and charges incurred in said survey (marked C).

All of which is most respectfully submitted.

HENRY B. HENDERSHOTT, *Comm'r, &c., Iowa.*
W. G. MINOR, *Commissioner, Mo.*

*5 * And the report of the surveyors employed by the commissioners, and above referred to as part of said commissioners' report, is in the words and figures following:—

Keokuk, September 30, 1850.

MESSRS. HENDERSHOTT AND MINOR, *Commissioners of the Boundary Survey.*

Gentlemen,—Having been appointed by you, on the part of the States of Iowa and Missouri severally, to locate and survey the boundary between those States, under the decree of the Supreme Court of the United States, we met according to your appointment, on the 28th of April last, near the supposed site of the old northwest corner, for the purpose of commencing operations in the field.

We proceeded to search for the old corner, which was to be the basis of our future operations. Having a certified copy of Sullivan's field notes, from the Surveyor-General's office at St. Louis, we knew that the corner had been originally located in timber, and designated by two witness-trees. Aided by a view of the topography of the locality,—as indicated in the notes, and especially by the manner in which Sullivan's north line crossed the Platte River near its terminus,—we were able to determine the locality of the corner approximately; and an inspection of the ground satisfied us that every evidence of its *exact* position had long since disappeared. Time, and the fires that annually spread over the prairies, had destroyed the witness-trees and every trace of both lines near the corner.

This point, known familiarly as the "old northwest corner," was the termination of the line surveyed by Sullivan, in 1816, from the mouth of the Kansas River north one hundred miles, and was the point at which he turned east, in running to the Des Moines River, his miles being numbered north from the Kansas, and east beginning again at the corner.

Having no *direct* evidence of the exact site of the required point, it became necessary to find determinate points in the two lines as near the corner as possible. Prolonging the lines severally from such points, their intersection would be the point to be assumed as the corner, and, if Sullivan's measurement were correct, would be the precise spot where he established it.

Near the supposed locality of the 99th mile corner on the north line, we found a decayed tree and a stump, which correspond in course, distance, and description with the witness-trees to that corner, and cutting into the tree we saw what we supposed to be the remains of an old blaze, upon which was pre-
*6 served a part, apparently, of the letter M. This supposition * was verified by measuring south two miles to a point, which we found to be Sullivan's

97th mile corner from one witness-tree,' which was perfectly sound. The marks upon it, two or three inches beneath the bark, were plain and legible.

On the east line we found the witness-tree to the 3d mile corner. The wood upon which the marks had been described was decayed, but their reversed impression appeared upon the new growth which covered the old blaze, and which was cut out in a solid block.

Prolonging the lines three miles each from the points thus determined, their intersection was assumed as the required corner, and at that point was planted the monument specified in the decree. By measurement made from the surveyed lines, we found the corner to be in the northeast quarter of section 35, township 67 north, range 33 west. Its exact position with reference to those lines can be seen in the diagram in the field notes. See *post,* *15.

The latitude of the corner, determined by a series of observations taken on the ground, we found to be 40° 34′ 40″ north. While employed upon these observations, we were delayed by unfavorable weather, and it was not till the 24th of May that we were in readiness to commence the survey of the west line from the corner to the Missouri River.

This portion of the boundary, being required to be a parallel of latitude, was run with Burt's solar compass, the use of which requires the longitude of the place of observation to be at least approximately known. Not having the requisite means of ascertaining the longitude of the corner, we calculated it from maps to be about 94° 30″ west from Greenwich, which was sufficiently accurate for the purpose. The instrument used being an untried one, some delay was experienced in its adjustment. To insure accuracy in the work, a telescope was attached to it.

The principles upon which this line was run involve a mathematical investigation, which will be found in Note A, accompanying this report, but the mode of running it will be briefly described here. Each successive mile was prolonged in the plane of the prime vertical passing through its beginning. The direction indicated by the instrument stationed at the beginning of a mile is in the plane of the prime vertical passing through that point, and that direction was continued through the mile by means of fore and back sights. At the end of the mile, an offset north was made to compensate for the sphericity of the earth. This offset, it will be seen by the note, is 6.855 inches for one mile. The instrument being moved at the end of the mile the proper distance north, and a
*7 new direction * given and continued as before, the parallel passing through the initial point was continued throughout the line. In some instances, however, it became convenient, whenever the nature of the ground admitted of it, instead of offsetting, to continue the same direction through several miles. It will be seen by the note, that the offsets increase as the squares of the distances, being for one mile 6.855 inches, for two miles, four times that distance, &c.

Thus it appears that the offsets rapidly increase with the distance run, and that, by continuing the direction of the prime vertical from the corner to the terminus, the southing would have been over 2,000 feet.

At the western terminus of the line, the observations for latitude were repeated. Having established that point, we returned to the northwest corner and commenced retracing Sullivan's east line on the 13th of August.

It is thirty-four years since this line was run, and every vestige of the mounds and pits established in the prairie has disappeared. Much of the coun-

try through which it passes consists of brushy barrens, or high rolling prairies, dotted with detached groves, or covered with a thin growth of dwarf timber. Much of this description of timber has been destroyed by fire, forming in some instances prairie, and in others brushy barrens, destitute of trees; while in some places an entirely new growth of young timber, principally hickory, has sprung up. In all such cases the witness-trees and other marks mentioned in Sullivan's field notes were gone, and thus it occurred that we frequently were several miles without finding any traces of the line. But in heavy bodies of timber no difficulty was experienced in discovering evidences of the precise location of the line, not only by blazes, but by line and witness-trees, many of which are sound, and the marks in good preservation. The general topography of the country, and especially the crossings of the streams, greatly facilitated us in following the line, and in some instances, when confirmed by the old blazes, enabled us to establish it with sufficient certainty. In the absence of any traces of the line between two known points, distant from each other more than one mile, we assumed the line to be straight between such points, and established our posts accordingly. This was done by running a random line from the last found corner, in a direction as near that pursued by Sullivan as we could determine, until another point was found, and then correcting back. No notice, however, is taken of these random lines in the field notes, which relate to the true line only.

*8 We soon satisfied ourselves that the line run by Sullivan * was not only not a due east line, but that it was not straight. That more or less northing should have been made in the old line was to have been expected from the fact that Sullivan ran the whole line with one variation of the needle, and that variation too great. This would account for the fact that the northing increases as he progressed east. But there are great irregularities in the course of the line, for which it is difficult to find a cause. Sudden deviations amounting to from one to three degrees frequently occur, and it rarely happens that any two consecutive miles pursue the same direction.

A resurvey of the line between the 91st and 134th miles was made in the year 1845, and we found the witness-trees on that part of the line defaced, and others substituted. We succeeded, however, in identifying Sullivan's trees, and we destroyed the marks of that survey as far as they related to the old line. In all instances where a corner on Sullivan's line is mentioned in our field notes, one or both witness-trees were found to identify it and we did not always think it necessary to repeat the fact in the notes.

Accompanying this report are the field notes and map of the boundary, the former of which are sufficiently explained in the note prefixed to them.

On the west line the monuments every ten miles were deemed sufficient. On the east line mile posts are established, marked, and witnessed as described in the field notes.

It will be perceived that the measurement of this line as run by us exceeds that of Sullivan by 11 $\frac{80}{100}$ chains, and that this increase, although gradual, is not regular. Some portions of the old line agree very nearly with our measurement, while others differ materially, and the greatest gain is generally made in brushy and broken land.

For the convenience of estimating distances, and that the true length of the line might be indicated by the mile posts, they were established by our measurement, taking care in every instance to note the distance of the posts set by us

from the corresponding corner in the old line whenever found. The different courses being extended from one known point to another, the line was not altered at those points, being made to pass through them, but only its length corrected.

The length of the entire line is 211 miles and 32 $\frac{80}{100}$ chains, embracing 4° 1′ 7″.29 of longitude. The length of a second of longitude is calculated in Note C, and the longitude of any point of the line being known, that of any other point can be deduced.

The map is platted from the field notes on a scale of half an inch to the mile, and is only intended to represent the general features in the topography of the line. The scale upon which it is made is much too small to show the angles in the east line, to do which would require it to be extended to a length that would render it inconvenient. All the purposes for which it can be used will be attained by its present form.

Wm. Dewey,
Surveyor on the part of Iowa.
R. Walker,
Surveyor on the part of Missouri.

Note A.

Put a = semi-equatorial axis of the earth.
c = semi-polar axis.
x = absciss, y = ordinate } to a point S on the terrestrial meridian.
e = eccentricity.
l = latitude of S.
r = radius of curvature at S.

Then considering the centre as the origin of the coördinates, we have

$$y^2 = \frac{c^2 (a^2 - x^2)}{a^2}$$

and, differentiating,

$$d y = - \frac{c^2 x d x}{a^2 y};$$

whence,

$$d x^2 + d y^2 = \frac{(a^4 y^2 + c^4 x^2) d x^2}{a^4 y^2} \quad \ldots\ldots\ldots\ldots (1.)$$

Differentiating again, we find

$$d^2 y = - \frac{(a^2 c^2 y^2 + c^4 x^2) d x^2}{a^4 y^3} \quad \ldots\ldots\ldots\ldots (2.)$$

Substitute these values (1 and 2) in the general equation

$$r = - \frac{(d x^2 + d y^2)^{\frac{3}{2}}}{a x d^2 y},$$

and we have

$$r = -\left(\frac{(a^4 y^2 + c^4 x^2)\, d x^2}{a^4 y^2}\right)^{\frac{3}{2}} \times -\frac{a^4 y^3}{(a^2 c^2 y^2 + c^4 x^2)\, d x^3}$$

$$= \frac{\left[a^4\left(\frac{c^2(a^2-x^2)}{a^2}\right) + x^2 (a^2-e^2)^2\right]^{\frac{3}{2}} a^4 y^3 d x^3}{a^6 y^3 \left(a^2 c^2 \frac{c^2 (a^2-x^2)}{a^2} + c^4 x^3\right) d x^3}$$

$$= \frac{(a^4 c^2 - a^2 c^2 x^2 + (a^2-e^2)^2 x^2)^{\frac{3}{2}}}{a^4 c^4}$$

*10 *

$$= \frac{(a^6 - a^4 e^2 - a^4 x^2 + a^2 e^2 x^2 + a^4 x^2 - 2 a^2 e^2 x^2 + e^4 x^2)^{\frac{3}{2}}}{a^4 c^4}$$

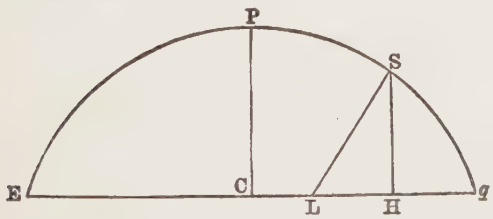
$$= \frac{(a^6 - a^4 e^2 - a^2 e^2 x^2 + e^4 x^2)^{\frac{3}{2}}}{a^4 c^4} = \frac{[(a^4 - e^2 x^2)(a^2 - e^2)]^{\frac{3}{2}}}{a^4 c^4}$$

$$= \frac{[(a^4 - e^2 x^2) c^2]^{\frac{3}{2}}}{a^4 c^4} = \frac{(a^4 - e^2 x^2)^{\frac{3}{2}} c^3}{a^4 c^4};$$

and, finally,

$$r = \frac{(a^4 - e^2 x^2)^{\frac{3}{2}}}{a^4 c} \quad \ldots\ldots\ldots\ldots\ldots\ldots\ldots\ldots\ldots\ldots \quad (3.)$$

The foregoing equation (3) is the proper expression for the radius of curvature when the value of x is known; but as, in the present case, the value of this quantity is unascertained, it will be better to deduce an equivalent expression involving only quantities which must, from the nature of the question, necessarily be known.



Let $E\ q$ represent the equatorial axis of the earth; $C\ P$, the semi-polar axis; P, the pole; S, a point on the terrestrial meridian at which the radius of curvature is required, and whose latitude $S\ L\ H = l$ is known; then, retaining the notation hitherto adopted, $C\ q = a$; $C\ P = c$; $C\ H = x$; and $S\ H = y$. $S\ L$ is normal to the meridian at S, and is, consequently, a part of r, the radius of curvature. In the right-angled triangle $S\ H\ L$, $L\ H : S\ H :: \cos. l : \sin. l$, and, from the properties of the ellipse, $\overline{C\ q}^2 : \overline{C\ P}^2 :: \overline{C\ H}^2 : L\ H$;

whence $L\ H = \frac{\overline{C\ P}^2 \times \overline{C\ H}^2}{\overline{C\ q}^2} = \frac{c^2\ x}{a^2}$.

And the first analogy becomes

$$\frac{c^2\ x}{a^2} : y :: \cos. l : \sin. l,$$

or, since $y = \frac{c}{a}(a^2 - x^2)^{\frac{1}{2}}$,

$$\frac{c^2\ x}{a^2} : \frac{c}{a}(a^2 - x^2)^{\frac{1}{2}} :: \cos. l : \sin. l;$$

*11 * whence,

$$\frac{c^2\, x\ \text{sin.}\ l}{a^2} = \frac{c}{a}(a^2 - x^2)^{\frac{1}{2}}\ \text{cos.}\ l,$$

and, dividing by $\frac{c}{a}$,

$$c\, x\ \text{sin.}\ l = a\,(a^2 - x^2)^{\frac{1}{2}}\ \text{cos.}\ l.$$

Squaring, we find

$$c^2\, x^2\ \text{sin.}^2 l = a^2\,(a^2 - x^2)\ \text{cos.}^2 l = a^4\ \text{cos.}^2 l - a^2\, x^2\ \text{cos.}^2 l.$$

Hence, since $c^2 = a^2 - e^2$,

$$(a^2 - e^2)\, x^2\ \text{sin.}^2 l = a^2\, x^2\ \text{sin.}^2 l - e^2\, x^2\ \text{sin.}^2 l = a^4\ \text{cos.}^2 l - a^2\, x^2\ \text{cos.}^2 l\ ;$$

and transposing,

$$a^2\, x^2\ \text{sin.}^2 l + a^2\, x^2\ \text{cos.}^2 l - e^2\, x^2\ \text{sin.}^2 l = a^2\, a^2\ (\text{sin.}^2 l + \text{cos.}^2 l)$$
$$- e^2\, x^2\ \text{sin.}^2 l = (\text{since}\ \text{sin.}^2 l + \text{cos.}^2 l = 1)\ a^2\, x^2 - e^2\, x^2\ \text{sin.}^2 l$$
$$= x^2 (a^2 - e^2\ \text{sin.}^2 l) = a^4\ \text{cos.}^2 l.$$

Whence we deduce

$$x^2 = \frac{a^4\ \text{cos.}^2 l}{a^2 - e^2\ \text{sin.}^2 l} \qquad \ldots\ldots\ldots\

Hence, if we express the other quantities in terms of a, we shall have, after a good deal of troublesome computation,

$$\begin{aligned} a &= 1.000000000 \\ c^2 &= 0.993326469 \\ l^2 &= 0.006673531 \\ \sin.^2 l = \sin.^2 40^\circ\ 34'\ 40'' &= 0.4231238233 \end{aligned}$$

and, substituting these values in equation (5), we have

$$r = \frac{.993326469}{(1 - 0.006673531 \times .4231238233)^{\frac{1}{2}}} = \frac{.993326469}{.99717627}$$

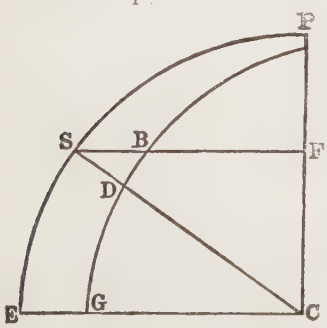
$$= \frac{.993326469}{.995767396} = .997548697 \quad \ldots\ldots\ldots\ldots \quad (6.)$$

or, resuming the foot as a unit,

$$r = 20{,}923{,}596 \times .997548697 = 20{,}872{,}306 \text{ feet} \quad \ldots\ldots\ldots \quad (7.)$$

A line traced upon the earth's surface in an east or west direction, and accurately prolonged by means of fore and back sights, will always remain in the plane of the prime vertical passing through its beginning; and consequently will gradually tend southward, according to a certain law. Hence, in running the line from Sullivan's corner to the Missouri River, it was necessary to apply certain corrections in order to regain the parallel of latitude passing through the initial point. These corrections may be ascertained in the following manner:—

We may, without sensible error, consider that part of the earth's surface on which we have been operating as a portion of the surface of a sphere whose radius is equal to the radius of curvature, as above ascertained.



Let $E\ C$, $P\ C$, represent the equatorial and polar radii, respectively, and $E\ C\ S = C\ S\ F = l$, the latitude of S. $C\ S$ and $F\ S$ represent, and are in the planes of, the prime vertical and the circle of latitude.

It is evident that these planes intersect each other at S, and that the line of intersection is tangential to the earth at that point. If, then, a line be traced from S, at right angles to the meridian $P\ E$, it will intersect any other meridian $P\ G$ at D. But the parallel intersects the same meridian at B. Hence, $D\ B$ is the required correction.

*13 * It thus appears that the planes represented by $S\ C$, $S\ F$, intersecting the plane of the second meridian, will form, externally to the earth, a figure which may be represented by $S\ D\ B$; and, the arc $D\ B$ being very small, this figure may be treated as a plane triangle, right-angled at D. The angle S, when projected upon the plane of the second meridian, will, of course, undergo a diminution; but when (as is the case here) the inclination of the two meridians is small, this

diminution becomes almost infinitesimal in amount, and may be disregarded. If, therefore, we put $u = S\ D$, and $v = B\ D$, we shall have

$$v = u \text{ tan. } l. \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad (8.)$$

But, making $d =$ the distance along the line between the meridians, we have from the properties of the circle

$$2r + u : d :: d : u;$$

whence, $u\ (2r + u) = d^2$, and $u = \frac{d^2}{2r + u}$; and the quantity u, in the divisor of the second number, being so minute, when compared with $2r$, as to have no effect upon the result within the limits we have adopted, this expression becomes,

$$u = \frac{d^2}{2r},$$

and, substituting this value in equation (8), we have

$$v = \frac{d^2 \text{ tan. } l}{2r} \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad (9.)$$

If now, in this expression, we make $d = 1$ mile, and substitute for the letters their numerical values, we shall have

$$v = 6.855 \text{ inches.}$$

A simple inspection of equation (9) will show that, the latitude being constant, v varies as d^2. Hence, we must offset north as follows:—

When	$d =$	1	mile,	$v =$	1×6.855	in. $=$	0	ft.	6.855	in.
"	" $=$	2	miles,	$v =$	4×6.855	" $=$	2	"	3.420	"
"	" $=$	3	"	$v =$	9×6.855	" $=$	5	"	1.695	"
"	" $=$	4	"	$v =$	16×6.855	" $=$	9	"	1.680	"
"	" $=$	5	"	$v =$	25×6.855	" $=$	14	"	3.375	"
"	" $=$	6	"	$v =$	36×6.855	" $=$	20	"	6.780	"
"	" $=$	7	"	$v =$	49×6.855	" $=$	27	"	11.895	"
"	" $=$	8	"	$v =$	64×6.855	" $=$	36	"	6.720	"
"	" $=$	9	"	$v =$	81×6.855	" $=$	46	"	3.255	"
"	" $=$	10	"	$v =$	100×6.855	" $=$	57	"	1.500	"
"	" $=$	60	"	$v =$	3600×6.855	" $=$	2056	"	6.000	"

*14

* Note B.

In note A, equation (7), we find 20,872,306 feet to be the length of the radius of curvature of the terrestrial meridian at the parallel of 40° 34′ 40″; and as this value may be considered constant for a short distance north or south of that parallel, and as radius, expressed in seconds, is equal to 206,264,806″, we have, for the length of a second of longitude on either side of the line, for a few miles,

$$1'' = \frac{20,872,306}{206,264,806} = 101.2 \text{ feet.}$$

Note C.

It is plain that the abscis x is equal to the radius of the circle of latitude passing through S.

In note A, equation (4), we have

$$x^2 = \frac{a^4 \cos.^2 l}{a^2 - e^2 \sin.^2 l};$$

whence,

$$x = \frac{a^2 \cos.\ l}{(a^2 - e^2 \sin.^2 l)^{\frac{1}{2}}};$$

or, using a as a unit, and substituting the numerical values,

$$x = \frac{.75953361}{(1 - .006673531 \times .4231238233)^{\frac{1}{2}}} = \frac{.75953361}{.99717627^{\frac{1}{2}}}$$

$$= \frac{.75953361}{.998587137} = .76060824;$$ and, resuming the foot as a unit,

$$x = 29{,}923{,}596 \times .76060824 = 15{,}914{,}660 \text{ feet},$$

Hence, along (or near) the parallel of 40° 34′ 40″, we have for the length of a second of longitude,

$$1'' = \frac{15{,}914{,}660}{206{,}264{,}806} = 77.1564 \text{ feet}.$$

We may, therefore, easily ascertain the difference of longitude between any two points in the line; and consequently, whenever the longitude at any one of these points shall have been determined, it will become known for all the others.

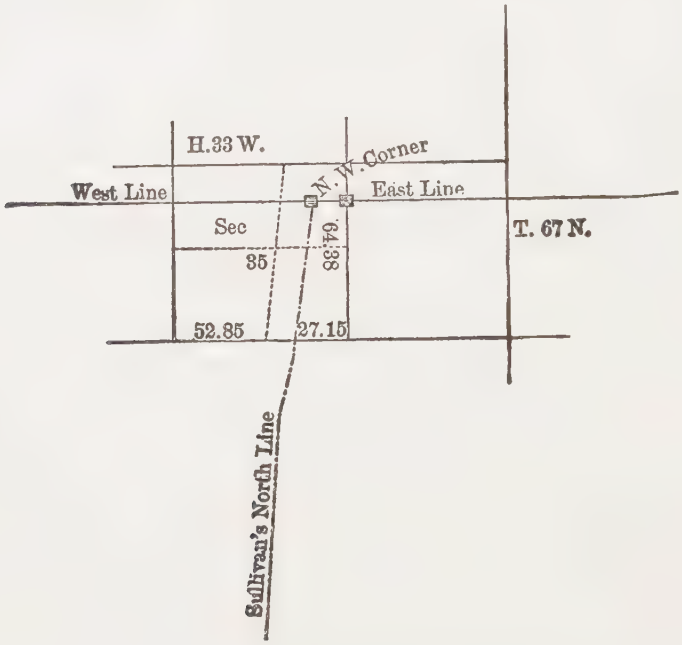
The following is a statement of the differences of longitude between the principal points in the line, viz.:—

	°	′	″
Between Sullivan's corner and monument near the Missouri River,	1	8	25.94
" " " " " " " Des Moines,	2	51	48.49
" the extreme monuments	4	0	14.43

And since the line extends west of the monument near the Missouri
*15 River 61 chains, and east of the monument near the * Des Moines 80 links, we see that the whole extent of longitude embraced by the line is 4° 1′ 7″.29.

And the field notes referred to by the said surveyors, Walker and Dewey, as part of their report, are in the words and figures following:—

Diagram showing the situation of the corner.



NOTE.

The field notes relate to the true line, as established on the ground. No notice is taken of random lines. The distances are reckoned in chains and links from the beginning of each mile.

When a post is noted as set in a mound, the pit is invariably nine links west, to designate it from other surveys. In the prairie the posts are marked with the letters "B. L." facing the east, the letter "I." facing the north, and the letter "M." facing the south, and the number of the mile marked on the west face of the post. In timber the number of the mile is marked on the witness-trees, with the letter appropriate to each state, there being one tree marked on each side of the
*16 line whenever * possible. The foot of each witness-tree is marked with the letters "B. L."

MISSOURI AND IOWA BOUNDARY—WEST LINE.

Commenced May 24th, and completed July the 12th, A. D. 1850.

Planted a cast-iron monument at the "northwest corner," latitude 40° 34′ 40″.3 north.

Missouri and Iowa Boundary. West line. Commencing at Sullivan's Northwest Corner.

Course West on a Parallel of Latitude.

1st Mile.

Dist.

5.00 Prairie.

18.30 Branch 6 lks. wide; runs south, skirted with timber.

27.00 Prairie.

Land rolling, second-rate.

2d Mile.

33.90 Brushy branch, 6 lks. wide, runs south, skirted occasionally with strips of timber.

Land rolling, second-rate.

3d Mile.

78.00 Timber.

Land rolling, soil second-rate.

4th Mile.

75.00 Honey Creek, 25 lks. wide, runs south.

78.00 Prairie.

Land rolling and second-rate, timber ordinary, black and burr oak, elm, hickory and walnut, and undergrowth brush of same.

5th Mile.

Second-rate rolling prairie.

6th Mile.

Second-rate rolling prairie.

7th Mile.

30.00 A small branch runs southwest.

74.00 Branch 4 links wide, runs south.

These branches unite about 10 chains below the line, and at their junction commences an extensive grove extending south.

Land rolling, soil second-rate.

8th Mile.

Rolling prairie, soil second-rate.

Dist.

*17 * 9th Mile.

First half rolling prairie; second half broken and covered with patches of hazel.

10th Mile.

Hazel continues.

50.00 Timber.

58.00 Drain runs northwest.

71.00 Prairie.

80.00 Set a cast-iron monument with the word "Boundary" facing both the east and west, the word "Iowa" facing the north, and the word "Missouri" facing the south.

Land rather broken; soil second-rate; timber poor and sparse, mostly black oak.

11th Mile.

4.50 Timber (a small grove).

6.25 Prairie.

13.00 Bottom.

21.00 East Fork, of 102.40 links wide, runs southwest.

27.00 Prairie.

Land rolling; second-rate. Prairie interspersed with hazel thickets. Timber tolerable; elm, lind, hickory, walnut, &c. The ridges are covered with hazel and scrub oak.

12th Mile.

54.50 Timber.

56.50 Middle Fork, of 102.25 links wide, runs south.

61.50 Prairie with patches of hazel.

Land rolling, soil second-rate. Bottom on the creek level and rich; timber indifferent.

13th Mile.

69.00 Timber.

74.50 West Fork, of 102.50 links wide, runs south, skirted with a narrow belt of sparse timber.

Land rolling, second-rate. Bottom rather wet.

14th Mile.

Rolling, second-rate prairie.

15th Mile.

Prairie, rather broken, second-rate. Patches of hazel and small groves of sparse timber.

16th Mile.

Same as last mile.

*18 * 17th Mile.

31.00 Timber.

31.25 Small branch runs northwest. Northeast corner of Mr. Short's field 300 links S. 45° W.

Dist.
50.00 Northwest corner of Short's field 200 links south.
64.00 Clear Creek, 10 links wide, runs southwest.
Land rolling; second-rate. Timber tolerable, black and burr oak, elm and walnut, &c., with undergrowth.

18th Mile.

1.50 Prairie. Land rolling, second-rate.

19th Mile.

Rolling, second-rate prairie.

20th Mile.

5.00 Drain runs northwest. Grove short distance north.
39.00 Cut off southwest corner of Davidson's field.
67.00 Drain northwest.
80.00 Set cast-iron monument facing as before.
Land rather broken; soil second-rate.

21st Mile.

Rolling, second-rate prairie.

22d Mile.

Mostly bottom prairie, level and rich.

23d Mile.

7.30 Nodaway River, 100 links wide, runs south, muddy channel, narrow belt of timber on the banks. The first half is rather wet bottom prairie. Last quarter of the mile brushy, and the end in a dense thicket.

24th Mile.

First quarter brushy, with thickets of hazel, &c.
Balance prairie, rolling, second-rate.

25th Mile.

Upland prairie, rolling, second-rate.

26th Mile.

Same as last mile.

27th Mile.

Rolling, second-rate prairie.

28th Mile.

29.50 Sparse timber.
34.00 Brushy prairie.
49.50 Drain southwest.
57.00 Timber.
65.00 Bottom.
68.50 Thicket of dense brush.
72.00 Branch, 6 links wide, runs southeast.
73.50 Prairie.
Land rolling, soil second-rate. Timber poor.

Dist.

*19 * 29th Mile.

5.00 Left bottom.
19.50 Small grove.
25.50 Left same. Prairie.
35.00 Bottom.
38.00 Timber.
43.00 Mill Creek, 15 links wide, runs south.
45.50 Prairie.
53.00 Left bottom (same as last mile).

30th Mile.

16.40 Small branch runs northeast, hazel on the banks.
80.00 Set cast-iron monument in a swale, facing as before.
Land very rolling, second-rate.

31st Mile.

Rolling upland prairie.

32d Mile

Same.

33d Mile.

Same.

34th Mile.

13.60 East Taskio, 80 links wide, runs south, banks steep, channel muddy, narrow belt of timber on the banks occasionally spreading out into considerable groves.
Upland rolling, second-rate. Bottom about ¾ mile wide, level and rich.

35th Mile.

Rolling upland prairie.

36th Mile.

The same.

37th Mile.

The same.

38th Mile.

9.90 Middle Taskio, 6 links wide, runs south.
Same as last mile.

39th Mile.

7.50 A wet swale.
17.00 Left swale.
50.00 East edge of a grove about 5 chains south, extending west.

40th Mile.

29.00 Timber.
69.25 West Taskio, 60 links wide, runs southwest. Prairie.
80.00 Set cast-iron monument, facing same as above.
Upland rolling, second-rate; bottom rich. Timber, burr oak, hickory, elm, &c.

Dist.

*20 * 41st Mile.

Upland rolling prairie.

42d Mile.

The same.

43d Mile.

The same.

44th Mile.

The same.

45th Mile.

The same.

46th Mile.

The same.

47th Mile.

26.40 High Creek, 5 links wide, runs southwest.

The same.

48th Mile.

The same.

49th Mile.

The same.

50th Mile.

80.00 Set cast-iron monument in a low, wet swale, facing as before.

Land same as last mile.

51st Mile.

44.90 Field fence north and south.

69.30 Fence north and south.

71.00 Timber.

Land as before.

52d Mile.

4.70 Left field fence north and south. Timber.

51.25 Branch, 4 links wide, runs north.

79.00 Road north and south. Prairie.

79.50 Touched the northwest corner of a field.

Land as usual. Timber tolerable, oak, hickory, elm, &c.

53d Mile.

7.75 Timber.

28.00 Field fence north and south.

40.10 Left field fence north and south. Prairie.

45.50 Timber.

64.75 Small branch runs south.

66.80 Field fence north and south (Sager's). Left timber.

Land broken, soil second-rate. Timber, oak, hickory, elm, &c.

*21 * 54th Mile.

00.60 Fence north and south, dividing Sager and Sebo.

7.50 Left field north and south.

10.00 Open burr-oak timber.

45.75 Spring branch southwest.

Dist.
59.50 Road north and south.
60.00 Field fence north and south. Prairie.
Land broken, second rate. Timber, burr oak, hickory, &c. The 51st, 52d, 53d, 54th, and 55th miles run through what is known as McKissock's Grove, embracing a fine farming country.

55th Mile.

2.50 Left field.
5.10 Top of steep bluff, sparse timber on the slope.
9.50 Bottom prairie.
30.00 Timber.
33.50 Nishnebotone River, 150 links wide, runs southwest. The bottom is level and rich, affording fine pasturage. There is a narrow strip of timber on the river.

56th Mile.

Level, rich bottom.

57th Mile.

22.80 Slough runs south.
Land the same.

58th Mile.

The same.

59th Mile.

The same.

60th Mile.

80.00 Set cast-iron monument, the words "State Line" facing the east, and the word "Iowa" facing the north, and the word "Missouri" facing the south. The ground here is high, affording a much more appropriate site for the monument than the terminus on the bank of the Missouri River, where the land is extremely liable to wash, and is frequently overflowed.

61st Mile.

9.50 Road north and south. The ground begins to become lower from this point.
15.75 Field fence north and south.
24.00 Left field fence north and south. Timber.
*22
57.50 A cottonwood, 30 inches diam., notched on the east and west sides, and marked with the letter "I." on the north, and "M." on the south.
61.00 Set a post on the bank of the Missouri River.
Bearings, { Cottonwood, 10 in. diam., S. 67° E. 6 lks.
" " " N. 21° W. 12 "
Rich bottom land, heavy body of timber, principally cottonwood and elm.

Missouri and Iowa Boundary. East Line from Sullivan's Northwest Corner.

Course S. 89° 24′ E.

1st Mile.—Var. of needle 11° E.

Dist.
4.00 Small branch, runs southwest.
10.50 Prairie.

Dist.
23.50 Drain south. Brushy prairie.
65.00 Touched south point of a grove.
80.00 Set post in mound.
Land very rolling, soil second-rate.

2d Mile.

10.50 Small branch runs southeast; bottom sparse timber.
16.00 Branch, 25 links wide, runs south.
27.00 Bottom prairie.
61.20 Branch, 25 links wide, runs southeast. Narrow skirt of timber on the banks.
75.00 Bushy upland prairie. Barrens.
80.00 Set 2d mile post in mound.

3d Mile.

59.50 Sparse timber.
77.00 Prairie.
80.00 Sullivan's 3d mile corner found by one witness-tree. Set 3d mile post in mound. 2d and 3d miles very rolling, with sparse timber and barrens.

Course N. 89° 45′ E.

4th Mile.

19.00 Bottom prairie.
50.50 Platt River, 75 links wide, runs south-southeast.
Narrow skirt of timber, Sullivan's blazes.
58.50 South point of a sharp bend in the river; the line enters the river a short distance.
66.00 Prairie.
72.00 Upland.
80.00 Set post in mound.
Land rolling, second-rate. Timber poor, hickory, elm, burr oak, &c.

*23 * 5th Mile.
80.00 Set post in mound.
Rolling upland prairie.

6th Mile.

80.00 Set 6th mile post in mound.
Land as last mile.

7th Mile.

13.50 Branch, 20 links wide, runs southwest. Timber.
14.25 " " " " " north.
16.00 " " " " " southwest.
Found Sullivan's blazes on the line.
35.60 Prairie.
51.50 Bottom.
80.00 Set 7th mile post in mound.
Upland broken, brushy barrens; bottom rich.

Dist.

8th Mile.

40.00 West fork of Grand River, 100 links, runs south. Timber.
61.50 Prairie.
80.00 Set 8th mile post in mound.
Land level and rich. Timber good, hickory, elm, black walnut, &c.

9th Mile.

28.00 Brushy upland prairie; sparse scrub-oak on the ridges.
54.50 Small branch runs southwest.
80.00 Set 9th mile post in mound.
Upland broken and brushy.

10th Mile.

42.50 Road northeast; open prairie.
80.00 Set cast-iron monument with the word "Boundary" facing both the east and the west, and the word "Iowa" facing the north, and the word "Missouri" facing the south. First half-mile broken and brushy, second half open prairie.

11th Mile.

80.00 Set 11th mile post in mound.
Land broken and brushy.

12th Mile.

25.00 Sparse timber, land broken.
29.00 Branch, 10 links wide, runs east-southeast.
31.00 Prairie.
80.00 Set 12th mile post in mound near a small branch.
Land rolling, second-rate.

*24 * 13th Mile.

0.05 Small branch runs south, scattering trees and brush on each side.
59.00 Timber. Creek a few links south.
71.00 Creek, 50 links wide, runs south.
73.00 " " " " " northwest.
78.50 " " " " " south.
This creek is very crooked, and has probably changed its channel since Sullivan run his line. The line is on his blazes.
80.00 Set 13th mile post.
Bearings, { Burr-oak, 18 in. diam., S. 20° E. 41 links.
{ Elm, 20 " " N. 20° W. 57 "
Land rolling, second-rate. Timber, elm, burr oak, hickory, lind, &c.

14th Mile.

1.40 Sullivan's 13th mile corner found by one witness-tree still standing.

Course N. 89° 43′ E.

40.20 Field. Left timber. The line is on Sullivan's blazes, through this timber.
50.75 Left field. Prairie.
80.00 Set 14th mile post in mound.
Land rolling, second-rate. Timber good, white and burr oak, elm, hickory, &c.

Dist.

15th Mile.

80.00 Set 15th mile post in mound.
Land rolling prairie.

16th Mile.—Var. 10° 30′ E.

39.00 Small branch runs southeast.
46.00 Branch, 12 links wide, runs south-southwest.
Narrow belt of timber on bank. Sullivan's blazes.
55.00 Sparse timber.
69.00 Prairie.
80.00 Set 16th mile post in mound.
Land rolling, second-rate.

17th Mile.

80.00 Set 17th mile post in mound.
Land same.

18th Mile.

30.00 Bottom.
80.00 Set 18th mile post in mound.
Upland rolling. Bottom rich.

*25 * 19th Mile.

13.50 Branch, 10 links wide, runs south; narrow belt of timber on the branch.
30.00 Timber (Lot's Grove).
32.50 Creek, 25 links wide, runs southwest.
80.00 Set 19th mile post.
Bearings, { White oak, 10 in. diam., N. 20° W. 129½ lks.
" " 14 " " S. 8° W. 85 "
Land rolling, second-rate. Timber good, white, black, and burr oak, elm, hickory, &c.

20th Mile.

2.15 Sullivan's 19th mile corner found by both witness-trees.

Course S. 89° 47′ E.

6.50 Small branch runs northwest. Prairie.
30.50 Small branch runs northwest.
80.00 Set cast-iron monument, facing as before.
Land broken and brushy; a few trees on east end of mile.

21st Mile.

67.50 Drain runs southwest.
80.00 Set post 21st mile.
Bearings, { Burr oak, 14 in. diam., S. 61° E. 181 links.
" " " " " N. 35° E. 74 "
Land broken and brushy.

22d Mile.—Var. 10° 10′ E.

1.00 Sullivan's 21st mile corner found by both witness-trees.

Dist.

Course N. 89° 29′ E.

6.00 Small branch, west-southwest, a few trees.
12.50 A small branch runs southwest.
80.00 Set 22d mile post in a mound.
Land broken and brushy. Barrens.

23d Mile.

5.00 Small branch runs north.
27.50 Small branch runs southwest.
80.00 Set 23d mile post in mound.
Land very rolling, with patches of hazel.

24th Mile.

23.00 Creek, 50 links wide, runs southwest. Timber.
26.09 " " " " northwest.
33.50 " " " " southwest.
35.00 Prairie.
80.00 Set 24th mile post in a mound.
Land rolling, second-rate. Timber indifferent, elm, hickory, and burr oak.

*26 * 25th Mile.—Var. 9° 54′ E.

67.50 Small branch runs northwest. Sparse timber.
80.00 Set 25th mile post.
Bearings, { Black oak, 20 in. diam., S. 31° W. 190 lks.
{ " " 20 " " N. 41° W. 262 "
Rolling, brushy prairie. Timber poor, black and burr oak, and hickory.

26th Mile.

2.00 Prairie.
14.50 Road northeast.
66.25 Small branch runs south. Grove 206 links south.
80.00 Set 26th mile post in a mound.
Land rolling, second-rate.

27th Mile.

80.00 Set 27th mile post in a mound.
Land same as last mile.

28th Mile.

22.00 Creek, 20 links wide, runs south. Timber.
27.84 Red oak, 36 in. diam., Sullivan's line tree. Noted by him as 26 chains.
80.00 Set 28th mile post on Sullivan's blazes.
Bearings, { Elm, 10 in. diam., S. 50° E. 60 links.
{ Black oak, 14 " " N. 5° E. 352 "
Land rolling. Timber good, white, burr, and red oak, elm, hickory, &c.

Course N. 89° 4′ E.

Dist.

29th Mile.

3.00 Prairie.
60.00 A few trees and brush.
80.00 Set 29th mile post in mound.
Rolling prairie.

30th Mile.

12.00 Small branch runs southeast.
80.00 Set cast-iron monument, facing as before.
Rolling prairie; rather brushy.

Course N. 88° 20′ E.

31st Mile.

11.50 Timber.
16.00 Creek, 50 links wide, runs southeast.
22.00 Prairie.
80.00 Set 31st mile post in mound.
Land same as before.

32d Mile.

80.00 Set 32d mile post in mound.
Rolling prairie.

*27 * 33d Mile.

20.50 Creek 25 links wide, runs southeast. Timber.
22.50 Prairie.
36.75 Stream, 10 links wide, runs south.
80.00 Set 33d mile post in mound.
Land same.

34th Mile.

69.83 Stream, 35 links wide, runs southeast. Timber.
78.50 Prairie.
80.00 Set 34th mile post.
Bearings, { Elm, 10 in. diam., N. 75° W. 63 links.
" 9 " " S. 45° W. 148 "
Land rolling; soil second-rate.

35th Mile.

3.67 Sullivan's 34th mile corner found by one witness-tree.

Course N. 88° 53′ E.

80.00 Set 35th mile post in mound.
Land rolling.

36th Mile.

40.75 Stream, 25 links wide, runs south; few trees on banks.
54.00 Timber.
78.50 Prairie.
80.00 Set 36th mile post in mound.
Rolling prairie.

Dist.

37th Mile.

80.00 Set 37th mile post in mound.
Rolling prairie.

38th Mile.

80.00 Set 38th mile post in mound.
Rolling prairie.

39th Mile.

31.00 Grove of young timber, hickory.
32.50 Prairie.
44.00 Grove of young hickory.
46.50 Prairie.
60.00 Timber.
62.60 Stream, 25 links wide, runs south; dry at present.
66.50 Small prairie, surrounded with timber.
76.50 Timber.
80.00 Set 39th mile post.

Bearings, { Burr oak, 9 in. diam., N. 20° E. 39 links.
{ Black oak, 12 " " S. 30° E. 22 "

Land rolling. Timber, burr and black oak, &c.

40th Mile.

5.50 Sullivan's 39th mile corner found by one witness-tree.
9.50 Prairie.
80.00 Set a cast-iron monument, facing as above, on the slope of a hill in the prairie.
Rolling prairie.

*28 * 41st Mile.

80.00 Set 41st mile post in mound.
Land as above.

42d Mile.

10.00 River bottom.
60.00 Timber.
76.00 Sullivan's line tree (an elm).
80.00 Set 42d mile post.

Bearings, { Cottonwood, 18 in. diam., S. 20° E. 17 links.
{ Maple, 9 " " S. 35° W. 1½ "

Land bottom and rich. Timber cottonwood, elm, maple, walnut, &c.

43d Mile.

0.50 Grand River, 200 links wide, runs southeast.
6.50 Sullivan's 42d mile corner.

Course N. 89° 6′ E—Var. 9° 6′ E.

11.50 Prairie bottom.
79.50 Upland and timber.
80.00 Set 43d mile post.

Dist.

Bearings, { Elm, 10 in. diam., N. 8° W. 79 links.
White oak, 10 " " S. 60° W. 158 "

Level, rich land.

44th Mile.

6.73 Sullivan's 43d mile corner found by one witness-tree.

Course N. 89° 47′ E.

61.00 Prairie.
73.00 Timber.
76.00 Prairie.
80.00 Set 44th mile post.

Bearings, { Pin oak, 15 in. diam., N. 82° W. 390 links.
" " " N. 63° W. 342 "

Land rolling. Timber oak and hickory.

45th Mile.

7.00 Sullivan's 44th mile corner found by one witness-tree.
Timber.

Course N. 89° 9′ E.

22.00 Prairie.
80.00 Set 45th mile post in mound.
Land as usual.

46th Mile.

73.00 Timber with thick undergrowth.
80.00 Set 46th mile post in mound. Barrens.

*29 * 47th Mile.

80.00 Set 47th mile post in mound.
Brushy barrens.

48th Mile.

53.00 Stream, 12 links wide, runs south.
80.00 Set 48th mile post in mound.
Brushy barrens.

49th Mile.

52.50 Timber.
60.50 Little River (a fork of Grand River), 60 links, runs S. E.
66.50 Same stream runs north.
71.50 " " " south.
80.00 Set 49th mile post.

Bearings, { White oak, 36 in. diam., S. 76° E. 39 lks.
" " 18 " " N. 63° E. 27 "

Land first-rate.

50th Mile.

6.20 Sullivan's 49th mile corner found by one witness-tree.

Dist.

Course N. 89° 16′ E.

10.00 Brushy prairie.
80.00 Set cast-iron monument facing as before. Barrens.

51st Mile.

80.00 Set 51st mile post in mound.
Rolling prairie.

52d Mile.

12.00 Timber.
25.00 River bottom.
28.50 East Grand River, 150 links wide, runs southwest.
38.50 " " " " " north.
52.30 " " " " " south.
80.00 Set 52d mile post.

Bearings, { Elm, 18 in. diam., N. 87¼° E. 10½ lks.
Burr oak, 12 " " N. 22° W. 28 "

Mostly rich bottom. White & burr oak, elm, hickory, &c.

53d Mile.

Course N. 88° 47′ E.

0.30 A pond, 250 lks. wide; direction of its length N. and S.
5.00 Prairie.
15.00 Timber.
30.00 Field (Stokes) fence nearly north and south.
57.50 Left field. Brushy prairie.
80.00 Set 53d mile post.

Bearings, { Black oak, 8 in. diam., S. 53° E. 15 links.
" " 6 " " N. 53° E. 64 "

Land rolling. Timber, oak and hickory, with undergrowth.

*30 * 54th Mile.

1.50 A small prairie surrounded by timber.
9.00 Timber and dense undergrowth of thorn, oak, &c.
80.00 Set 54th mile post.

Bearings, { Black oak, 12 in. diam., N. 55° W. 73 lks.
" " 14 " " S. 9° W. 124 "

Growth of small timber and dense underbrush.

55th Mile.

4.07 Sullivan's 54th mile corner found by both witness-trees.

Course N. 89° 2′ E.

32.70 Branch 10 links wide, runs south.
42.50 " " " " northwest.
62.75 Prairie (small and surrounded with timber).
71.00 Alexander's field fence nearly north and south.
80.00 Set 55th mile post in a field; first-rate upland.

56th Mile..

7.00 Fence nearly north and south.
9.00 Fence runs a little south of east.

Dist.
11.00 Brushy thicket; plum, scrub-oak, sumac, &c.
20.00 Timber.
31.00 Prairie.
75.00 Fence about N. 65° E. (Hodges.)
80.00 Set 56th mile post in mound.
Land same as before.

57th Mile.

8.50 Fence about N. 25° W.
47.50 Road north and south.
80.00 Set 57th mile post in mound.
Rolling prairie.

58th Mile.

31.00 Timber with dense undergrowth.
31.35 Stream, 10 links wide, runs northeast.
31.80 Same; runs east.
32.25 Same; runs northeast.
49.75 Same; runs south.
53.00 Prairie.
57.50 Brushy prairie.
58.75 Prairie.
60.50 Brushy thicket.
65.00 Timber, with dense undergrowth.
75.90 Sullivan's line tree (elm).
80.00 Set 58th mile post.
Bearings, { Pin oak, 8 in. diam., S. 77° E. 43 links.
" " 6 " " N. 11° E. 41½ "
Land rolling; soil good. Timber small, with a dense undergrowth.

*31 * 59th Mile.

2.53 Sullivan's 58th mile-corner found by both witness-trees.

Course N. 89° 27′ E.

3.65 West Fork of Muddy Creek, 25 links wide, runs south.
55.00 Middle fork of Muddy Creek, 25 links wide, runs southeast.
79.00 Prairie.
80.00 Set 59th mile post, in mound.
Land same as before.

60th Mile.

0.45 Field Sullivan's fence north and south.
12.45 Fence north and south. Prairie.
35.25 Field (Sullivan's and Lochlin's) fence about S. 25° W.
45.20 Fence about S. 65° E.
80.00 Set cast-iron monument facing as before.
Land good.

61st Mile.

19.80 East fork of Muddy Creek, runs south; very little timber on banks.
80.00 Set post to 61st mile in mound.
Land good.

Dist.

62d Mile.

80.00 Set 62d mile post in mound.
Rolling prairie.

63d Mile.

80.00 Set 63d mile post in mound.
Rolling prairie.

64th Mile.

Set 64th mile post in mound.
Same.

65th Mile.

7.00 Timber.
11.00 Prairie.
19.65 West fork Medicine Creek, 40 links, runs south. Timber.
22.50 Field fence north and south.
33.25 Left field fence north and south.
47.50 Prairie.
80.00 Set 65th mile post in mound.
Land good. Timber indifferent.

66th Mile.

62.50 Timber.
80.00 Set 66th mile post.
Bearings, { White oak, 16 in. diam., N. 63° E. 14 lks.
" " 16 " " S. 55° W. 20 "
Rich land.

*32 * 67th Mile.

4.50 Sullivan's 66th mile-corner found by one witness-tree.

Course N. 89° 42′ E.

9.20 Middle Medicine Creek, 25 links wide, runs southeast.
13.40 Same; runs northeast.
16.20 Same; runs southeast.
18.00 Prairie.
44.50 Timber.
45.21 Big Medicine Creek, 60 links wide, runs southeast.
80.00 Set 67th mile post.
Bearings, { White oak, 10 in. diam., S. 47° E. 48 lks.
" " 8 " " N. 40° W. 25 "
Broken, second-rate land.

68th Mile.

4.62 Sullivan's 67 mile-corner found by both trees.

Course N. 89° 35′ E.

25.48 Sullivan's line tree (a white oak).
31.30 Collins's field; fence nearly north and south.

Dist.
41.25 Left field fence nearly north and south.
61.50 Timber.
72.50 Prairie.
80.00 Set 68th mile post in mound.
(Corrected this mile from the line tree.)
Land second-rate.

Course N. 89° 21′ E.

69th Mile.

8.00 East Medicine Creek, 30 links wide, runs southeast.
Timber on the bank.
17.00 Timber open white oak.
47.50 Prairie.
80.00 Set 69th mile post in mound. Land rolling.
Timber white oak, elm, and hickory.
Land second-rate.

70th Mile.

80.00 Set cast-iron monument facing as before.
Same. Rolling prairie.

71st Mile.

80.00 Set 71st mile post in mound.
Same.

72d Mile.

80.00 Set 72d mile post in mound.
Same.

73d Mile.

80.00 Set 73d mile post in mound.
Same.

*33 * 74th Mile.

41.00 Stream, 15 links wide, runs south. Timber
47.50 Prairie.
60.10 Stream, 10 links wide, runs southwest. Narrow strip of timber on banks.
80.00 Set 74th mile post in mound.
Land same.

75th Mile.

80.00 Set 75th mile post in mound.
Same.

76th Mile.

80.00 Set 76th mile post in mound.
Same.

77th Mile.

66.30 Stream, 50 links wide, runs southwest. Timber.
80.00 Set 77th mile post.

Dist.

Bearings, { Bell oak, 15 in. diam., S. 23° W. 30 links.
" " 15 " " N. 44° E. 20 "

Broken, second-rate land.

78th Mile.

9.20 Sullivan's 77th mile corner found by both witness-trees.

Course N. 88° 57′ E.

47.00 Prairie.
55.75 Smith's field fence north and south.
58.40 Timber.
64.50 Prairie.
74.00 Field fence north and south.
80.00 Set 78th mile post in a field.
Land rolling, soil second-rate. Timber, oak and hickory.

79th Mile.

9.00 Left field fence north and south. Prairie.
49.50 Timber generally small, with underbrush.
59.20 Stream, 10 links wide, runs south.
77.50 Small prairie.
80.00 Set 79th mile post in mound.
Same.

80th Mile

2 50 Timber.
14.60 Stream, 10 links wide, runs south.
41.50 Prairie.
80.00 Set cast-iron monument, facing as before.
Same.

81st Mile.

40.50 Mormon trace north and south.
80.00 Set 81st mile post in mound. Rolling prairie.

*34 * 82d Mile.

4.50 Stream, 10 links wide, runs south. Timber on the banks.
80.00 Set 82d mile post in mound.
Same.

83d Mile.

80.00 Set 83d mile post in mound.
Same.

84th Mile.

80.00 Set 84th mile post in mound.
Rolling prairie.

85th Mile.

80.00 Set 85th mile post in mound.
Same.

86th Mile.

29.50 Benner's house, about 150 links north.
80.00 Set 86th mile post in mound.
Prairie, with clumps of oak.

Dist.

87th Mile.

80.00 Set 87th mile post in mound.
Land same.

88th Mile.

38.50 Timber.
80.00 Set 88th mile post in mound.
Prairie, with scattering trees. Sparse timber.

89th Mile.

13.34 Sullivan's 88th mile corner found by one witness-tree.

Course N. 89° 12′ E.

33.75 Stream, 50 links wide, runs southeast.
65.28 Sullivan's line tree (a white oak).

Course S. 89° 15′ E.

80.00 Set 89th mile post.
Bearings, { White oak, 24 in. diam., N. 15° W. 65 links.
" " 24 " " S. 13° W. 82 "
Poor, broken land.

90th Mile.

3.50 Small prairie, surrounded by timber.
12.82 Sullivan's 89th mile corner.

Course N. 88° 57′ E.

15.00 Timber.
80.00 Set cast-iron monument facing as before. Timber white and black oak, with undergrowth.
Land rolling.

91st Mile. Var. 9° 36′ E.

12.71 Sullivan's 90th mile corner.

Course N. 89° 5′ E.

38.40 Small branch runs southeast.
80.00 Set 91st mile post.
Bearings, { White oak, 24 in. diam., S. 7½° E. 49 links.
" " 20 " " N. 18½° E. 89 "
Land broken, third-rate. Timber, white and black oak, &c.

*35 * 92d Mile.

8.55 Corner to intersection of supposed Sullivan's line with range-line between ranges 17 and 18 (Iowa sur.).
12.19. Sullivan's 91st mile corner.

Course N. 89° 12′ E.

34.05 Corner to intersection of supposed Sullivan's line with range-line between ranges 17 and 18 (Mo. sur.).
43.00 Prairie.
46.50 Cut off the southeast corner of a field.
49.10 Left field.

Dist.
52.00 Timber.
54.70. West fork of Chasiton, 100 links wide, runs southeast.
80.00 Set 92d mile post.

Bearings, { White oak, 14 in. diam., S. 4½° E. 41 links.
" " 14 " " North 41 "

Upland broken, third-rate; narrow bottom on the river, first-rate. Timber, white and black oak, &c.

93d Mile.

12.36 Sullivan's 92d mile corner.
15.00 Small branch runs northwest.
19.33 Sullivan's line tree.
80.00 Set 93d mile post.

Bearings, { White oak, 12 in. diam., N. 23° W. 30 links.
" " 6 " " S. 4° E. 40 "

Land broken, third-rate. White and black oak, hickory, &c.

94th Mile.

12.20 Sullivan's 93d mile corner.

Course N. 89° E.

25.00 Prairie.
80.00 Set 94th mile post in mound.
Land broken, second-rate soil.

95th Mile.

0.30 Road northeast and southwest.
80.00 Set 95th mile post (in the brush) in a mound.
Land broken, second-rate. Brushy, a few trees.

96th Mile.

63.00 Jack-oak grove.
68.50 Small prairie, surrounded by timber.
75.75 Small branch runs northeast.
80.00 Set 96th mile post.
Bearings, Burr oak, 14 in. diam., N. 11° E. 235 links.
Land broken, second-rate. Scrub-oak, crab, thorn, &c.

*36 * 97th Mile.

71.80 Sullivan's 96th mile corner found by his elm tree.

Course N. 88° 33′ E.

22.00 Heavy timber, more open.
35.00 Sparse, open timber.
53.00 Thicket of scrub-oak, crab, thorn, &c.
80.50 Set 97th mile post.

Bearings, { Black oak, 6 in. diam., N. 40° E. 12 links.
Pin " 12 " " S. 29° E. 126 "

Land broken, second-rate. Timber poor.

Dist.

98th Mile.

11.84 Sullivan's 97th mile corner, witness-trees defaced.

Course N. 89° 3′ E.

26.50 Small branch runs north.
29.50 Barren, brushy prairie.
42.00 Sparse timber.
56.58 Sullivan's line tree (black oak, 24 inches diameter.)

Course N. 88° 53′ E.

78.00 Bottom prairie.
80.00 Set 98th mile post in mound.
Land rolling, soil second-rate.

99th Mile.

19.85 Field fence north and south; north side of field 25 links north of line and parallel with it.
35.35 Left field.
37.00 Thicket and sparse timber.
42.00 Bottom prairie, level and wet.
80.00 Set 99th mile post in mound.
Upland is good soil.

100th Mile.

7.50 Timber.
12.06 Sullivan's 99th mile corner; witness-trees defaced.

Course N. 88° 57′ E.

14.00 Right bank of Chariton, 150 links, runs southwest.
17.25 Left bank of river (by triangulation); left bottom.
80.00 Set cast-iron monument, facing as before.
Land rolling, second rate. Timber good, white and black oak, hickory, &c.

101st Mile.—Var. 9° 30′ E.

9.00 Timber.
12.77 Sullivan's 100 mile corner.

*37 * Course N. 89° 2′ E.

20.29 Sullivan's line tree
34.00 Low, wet prairie. Land rolling, to this point.
63.00 Timber, upland.
80.00 Set 101st mile post.

Bearings, { Black oak, 14 in. diam., S. 38° E. 62½ lks.
{ White " " " " N. 10¾° E. 119 "

Timber good, white and black oak, hickory, &c.

102d Mile.

12.78 Sullivan's 101st mile corner. Trees defaced.

Course N. 88° 47′ E.

54.80 Road north and south.
80.00 Set 102d mile post.

Dist.

Bearings, { Hickory, 14 in. diam., S. 4° E. 88 lks.
White oak, 12 " " N. 58¾° W. 61½ "

Land rather broken. Timber good, white and black oak.

103d Mile.

6.00 Small branch runs north.
12.40 Sullivan's 102d mile corner.

Course N. 88° 56′ E.

43.60 Road nearly north and south. House 500 links south.
64.00 Prairie.
77.50 Timber.
80.00 Set 103d mile post.

Bearings, { Elm, 20 in. diam., N. 12° E. 46 links.
" 20 " " S. 22° W. 46 "

Land rolling, second rate. Timber indifferent, brush.

104th Mile. Var. 8° 45′ E.

11.96 Sullivan's 103d mile corner, one witness [tree] standing.

Course N. 88° E.

12.00 Prairie.
17.20 Field (Veach) fence north and south.
48.20 Left field fence north and south.
80.00 Set 104th mile post in mound.
Land rolling; soil second-rate.

105th Mile.

80.00 Set 105th mile post in mound.
Same.

106th Mile.

52.00 Small grove and thicket.
65.75 Small branch, runs south.
69.50 Prairie.
80.00 Set 106th mile post in mound.
Land same.

*38 * 107th Mile.

45.00 Grove and thicket.
80.00 Set 107th mile post.

Bearings, { Black oak, 12 in. diam., S. 20° E. 43 links.
" " 12 " " N. 8° W. 7 "

Land rolling, second rate. Brushy, timber poor.

108th Mile.

12.69 Sullivan's 107th mile corner.

Course N. 87° 39′ E.

20.00 Small Prairie.
26.00 Timber.

Dist.
30.20 Small branch runs south.
64.50 Prairie.
80.00 Set 108th mile post in ground. Timber poor.

109th Mile.

80.00 Set 109th mile post in mound.
Rolling Prairie.

110th Mile.

11.40 Field fence north and south (Wright).
20.00 Left field.
70.00 Timber and patches of brush.
75.00 House 200 links north of line (Baker).
80.00 Set cast-iron mounment, facing as before.
Land rolling. Timber poor and sparse.

111th Mile.

12.34 Sullivan's 110th mile corner.

Course N. 86° 7′ E.

80.00 Set 111th mile post in mound. In small prairie, surrounded by dense thickets.
Land broken, second rate. Scrub timber and small prairies.

112th Mile.

3.00 Heavy Timber.
11.50 Sullivan's 111th mile corner.

Course N. 87° 56′ E.

14.50 Small branch, general course east; the line runs down it, crossing it several times.
41.50 Left branch, course northeast.
73.00 Same branch runs south.
76.00 Same branch runs northeast.
80.00 Set 112th mile post on Sullivan's blazes.
Bearings, { White oak, 20 in. diam., N. 3° E. 119 links.
" " 14 " " S. 15½° W. 155 "
Land good. Timber, white, black, and burr oak, hickory, elm, &c.

*39 * 113th Mile.

11.09 Sullivan's 112th mile corner.

Course N. 88° 21′ E.

60.50 Field fence north and south.
74.75 Left same.
76.50 Bottom prairie.
80.00 Set 113th mile post in prairie.
Bearings, Burr oak, 20 in. diam., N. 15½° E. 268 links.
Land and timber as last mile.

Dist.

114th Mile.

25.00 Timber.
33.00 Fabius River (west fork), 50 links, runs southeast.
50.72 Sullivan's line tree.
65.00 Barrens.
80.00 Set 114th mile post.

Bearings, { Black oak, 12 in. diam., N. 42½° W. 177 lks.
" " 6 " " S. 29½° E. 40 "

Land good. Timber, hickory, black oak, elm, &c.

115th Mile.

7.70 Field fence north and south. Prairie.
34.00 Left field fence north and south.
80.00 Set 115th mile post in mound.
Rolling prairie.

116th Mile.

36.00 Scrub-oak thicket.
48.00 Prairie.
75.00 McAtee's field fence north and south.
80.00 Set 116th mile post in field.
Same.

117th Mile.

15.50 Left field fence north and south.
40.00 Timber on Sullivan's blazes.
75.15 East Fork of Fabius, 50 links wide, runs south.
80.00 Set 117th mile post.

Bearings, { Hickory, 12 in. diam., S. 3½° E. 73 links.
" 20 " " N. 14° W. 91 "

Land good. Timber hickory, elm, white and black oak, &c.

118th Mile.

Course N. 88° 17′ E.

65.00 Prairie.
80.00 Set 118th mile post in mound.
Land good. Timber, burr and black oak, hickory, &c., and brush.

119th Mile.

9.25 Field fence north and south.
19.40 Left field near southeast corner. Thicket.
53.50 Hickory branch, 15 links wide, runs east-southeast.
80.00 Set 119th mile post in black-oak thicket.

Bearings, { Black oak, 8 in. diam., S. 38° W. 15½ links.
" " 5 " " N. 5° E. 14½ "

Land second-rate. Timber poor, black oak and hickory.

Dist.

*40 * 120th Mile.

2.00 Prairie.
80.00 Set cast-iron monument, facing as before.
Rolling prairie.

121st Mile.

80.00 Set 121st mile post in mound, edge of thicket.
Same.

122d Mile.

13.00 Branch, 10 links wide, runs south. Timber thicket.
17.55 Range-line between ranges 12 and 13.
29.50 Prairie.
40.00 Jack-oak thicket.
80.00 Set 122d mile post.
Bearings, Jack oak, 6 in. diam., S. 12° E. 47 links.
Land second-rate. Timber poor.

123d Mile.

15.04 Sullivan's line tree (a black oak, noted as a hickory).

Course N. 88° 12′ E.

20.00 House 300 links south (J. N. Bish).
23.00 Touched northeast corner of field.
31.50 Small low, wet prairie, extending south.
45.00 Timber.
53.20 Wyacondah Creek, 40 links wide, runs southeast.
56.20 Enter creek, running east.
59.70 Left same creek, running southeast.
67.00 Cut off south corner of field.
69.00 Bushy prairie.
80.00 Set 123d mile post.
Bearings, White oak, 24 in. diam., S. 28½° W. 54 links.
Land brushy, timber poor.

124th Mile.

1.50 Prairie.
15.00 Thicket and a few trees.
29.50 Open prairie. House 300 links south.
33.00 Touched northwest corner of a field.
80.00 Set 124th mile post in mound.
Land rolling. Timber poor, with undergrowth.

125th Mile.

80.00 Set 125th mile post in mound
Rolling prairie.

*41 * 126th Mile.

46.00 Timber.
47.00 Branch, 25 links wide, runs south-southeast.

Dist.
52.00 Prairie.
63.50 Thicket of black and jack oak.
71.00 Prairie.
80.00 Set 126th mile post in mound.
Land as usual.

127th Mile.

29.00 Drain runs southeast.
80.00 Set 127th mile post in mound.
Rolling prairie.

128th Mile.

30.20 Small branch runs southeast. Small grove.
80.00 Set 128th mile post in mound.
Rolling prairie.

129th Mile.

10.84 Sullivan's 128th mile corner.

Course N. 87° 58′ E.

13.00 North point of a grove.
80.00 Set 129th mile post in mound.
Same.

130th Mile.

80.00 Set cast-iron monument, facing as before.
Same.

131st Mile.

53.50 Small branch runs southeast. Timber on banks.
80.00 Set 131st mile post in mound.
Same.

132d Mile.

80.00 Set 132d mile post in mound.
Same.

133d Mile.

13.00 Branch, 10 links wide, runs southeast. Timber.
13.50 Sullivan's 132d mile corner.

Course N. 87° 50′ E.

80.00 Set 133d mile post in mound.
Same.

134th Mile.

16.50 Field fence nearly north and south.
28.40 Left field. Thicket and sparse timber.
54.50 Small wet prairie.
59.25 Timber. Thicket.
61.50 Creek 15 links north of line.
63.50 Little Fork Creek, 40 links wide, runs south.
67.80 Sullivan's line tree.

Dist.

80.00 Set 134th mile post.

Bearings, { Burr oak, 10 in. diam., N. 35° E. 69 links.
{ Hickory, 14 " " S. 46° E. 89 "

Land good. Timber poor. Dense undergrowth.

Course N. 88° E.

*42 * 135th Mile.

35.00 Brushy prairie.
46.10 Field fence north and south. Thicket. Field is waste ground.
57.50 Left field. Thicket.
58.00 House 250 links south (Circles).
60.85 Small branch runs south. Brushy prairie.
62.00 Road to Keozanqua, north and south.
80.00 Set 135th mile post in mound.
Prairie, with brush and thickets.

136th Mile.

5.00 Road to Farmington a little north of east.
11.50 Touched northwest corner of a field in a lane.
30.75 Touched southeast corner of another field. Prairie.
60.00 Northeast corner of a field, 12.00 south.
80.00 Set 136th mile post in mound.
Rolling prairie.

137th Mile.

22.00 Road to Farmington east-northeast.
60.00 Brushy barrens.
80.00 Set 137th mile post in mound.
Same.

138th Mile.

27.50 Prairie.
30.00 A small drain runs northwest.
42.00 A field fence north and south.
71.60 Left field fence north and south. Prairie.
80.00 Set 138th mile post in mound.
Same.

139th Mile.

21.00 Timber.
25.00 Small stream runs north.
26.50 Prairie.
66.00 Road northeast and southwest.
80.00 Set 139th mile post in mound.
Rather level, second rate.

140th Mile.

6.50 Sparse timber and barrens.
14.83 Sullivan's 139th mile corner.

Dist.

Course N. 87° 24′ E.

75.00 Heavy timber.
80.00 Set cast-iron monument, facing as before.
Land rolling. Timber, black and white oak, hickory, and dense undergrowth of same, with crab, &c.

*43 * 141st Mile.

14.54 Sullivan's 140th mile corner.

Course N. 87° 56′ E.

38.76 Big Fox River, 50 links, runs a little east of south.
49.84 Same, runs north.
56.50 Same, runs east-southeast.
59.25 Same, runs north.
77.00 Enter river, runs southeast.
80.00 Left same, and set 141st mile post on the bank.
Bearings, { Birch, 22 in. diam., N. 55° E. 128 links. / Elm, 24 " " S. 15° W. 58 "
Land on river level; other, same as last

142d Mile.

8.20 Fox River runs south.
13.85 Sullivan's 141st mile corner.

Course N. 88° 9′ E.

23.00 Fox River runs north.
25.00 Same, " south.
35.00 Enter river, " east.
40.70 Left " " southeast.
43.00 Prairie.
75.00 Timber. Upland.
80.00 Set 142d mile post.
Bearings, { Black oak, 30 in. diam., N. 8¼° E. 115 lks. / " " 20 " " S. 69 "
Land level, second-rate. Timber poor; dense undergrowth.

143d Mile.

49.50 Road to Churchville runs southeast.
80.00 Set 143d mile post in mound (in the brush).
This is exceedingly brushy; scrub oak, &c.

144th Mile.

11.80 Sullivan's 143d mile corner.

Course N. 87° 15′ E.

80.00 Set 144th mile post.
Bearings, { White oak, 10 in. diam., S. 10° W. 28 links. / " " 10 " " N. 29° E. 81 "
This mile is brushy; barrens.

Dist.

*44 * 145th Mile.

2.50 Prairie. Barrens.
43.00 Brushy barrens.
80.00 Set 145th mile post in brush.
Bearings, { Burr oak, 14 in. diam., South 75 links.
" 18 " " North 34 "
Barrens.

146th Mile.

12.00 Sullivan's 145th mile corner.

Course N. 87° 38′ E.

29.50 Prairie.
46.50 Touched northwest corner of a field, a lane runs parallel with and 25 links north of the line.
57.50 House 50 links north (William Hatton).
67.50 Lane turns south, field fence north and south.
74.00 Left field fence north and south. Prairie.
80.00 Set 146th mile post in mound.
Land as before.

147th Mile.

12.00 Thicket.
42.00 Prairie.
69.00 Thicket.
80.00 Set 147th mile post in thicket.
Bearings, Red oak, 30 in. diam., S. 46° E. 256 links.
Barrens.

148th Mile.

3.00 Branch, 6 links wide, runs north.
30.00 Prairie.
58.50 Field fence north and south.
61.00 Road to Churchville north and south.
80.00 Set 148th mile post in a field.
Prairie, with brushy barrens.

149th Mile.

3.90 Left field fence north and south.
30.00 Brush and timber.
59.00 Road north and south.
80.00 Set 149th mile post in edge of a small prairie.
Bearings, Burr oak, 12 in. diam., S. 1½° E. 172 links.
Land good. Timber indifferent, burr and black oak, hickory, elm, &c., with a dense undergrowth.

150th Mile.

3.50 Timber.
80.00 Set 150th mile post.
Bearings, { White oak, 10 in. diam., N. 27° W. 93 links.
" 20 " " S. 30½° E. 90 "

Dist.

Land broken, second-rate. Timber, white and black oak, hickory, &c., underbrush.

*45 * 151st Mile.

4.90 A small saltpetre cave, noted by Sullivan.

41.50 River bottom.

51.00 Set a cast-iron monument on the bank of the Des Moines River, with the words "State Line" facing the west, and the word "Missouri" facing the south, and the word "Iowa" facing the north.

51.80 Sullivan's terminus on the lower bank found by one witness-tree still standing. River bottom rich. Timber, white and black oak, hickory, lind, elm, &c.

September 18, 1850.

Keokuk, September 30, 1850.

We certify the foregoing to be the correct field notes of the survey of the boundary between Iowa and Missouri, as run by us.

R. WALKER,
Surveyor on the part of Missouri.
WM. DEWEY,
Surveyor on the part of Iowa.

And the report of the Hon. Robert W. Wells and Henry B. Hendershott, which is above referred to, and which was made to the last term of this court, is as follows:—

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

The undersigned, appointed by this honorable court commissioners in the above cases, to establish the boundary line between the States of Missouri and Iowa, respectively report that upon being furnished with copies of the decree, they, in compliance therewith, addressed letters to the chief magistrates of those States, through their Secretaries of State, respectfully requesting the coöperation and assistance of the State authorities in the performance of the duties imposed on the commissioners by said decree; and they received assurances, in answer to their letters, of all the aid and assistance within their power.

The Governor of the State of Missouri consented to consider an appro-
*46 priation of two thousand dollars, made by the General * Assembly for the purpose of conducting the suits, as applicable to the establishment of the boundary by the commissioners; and agreed to place that sum at their disposal for that object.

The Governor of the State of Iowa entertained the opinion, it is understood, that no appropriation had been made by the Legislature of that State, applicable to the survey of the boundary, but endeavored to obtain the necessary funds from other sources; and, as the undersigned are advised, obtained them. But the commissioners were not informed of this until about the 23d of October last,—then too late to procure the necessary assistants, fit out an expedition, travel to the place of commencing operations and complete the work in the field, before the weather would, in all probability, become too inclement in the vast and high prairies through which the line will pass. As the grass in the prairies is burned

in October, there would also be some difficulty, after that, in procuring provender for the teams necessary for the transportation of the baggage, provisions, and monuments.

For these reasons, and others with which it is unnecessary to trouble the court, the commissioners resolved not to attempt the work in the field until the opening of the spring.

The commissioners have procured all the monuments necessary for the line. Three are of the size and description directed in the decree. Nineteen other cast-iron monuments, six of which are four feet long, eight inches square at the base, and five inches square at the top, to be placed at intervals of thirty miles; and thirteen of which are seven inches square at the base, and four inches square at the top, and four feet long. These nineteen monuments each have the word "Missouri" on one side, and "Iowa" on the opposite side, and the word "Boundary" on the other opposite sides, strongly cast into the metal. All the monuments are cast *solid;* and will weigh about 13,000 pounds, and cost three cents per pound.

A drawing of the largest sized monument is annexed. [See page 934.] The others are similar in form, except as hereinbefore mentioned.

All of which is most respectfully submitted.

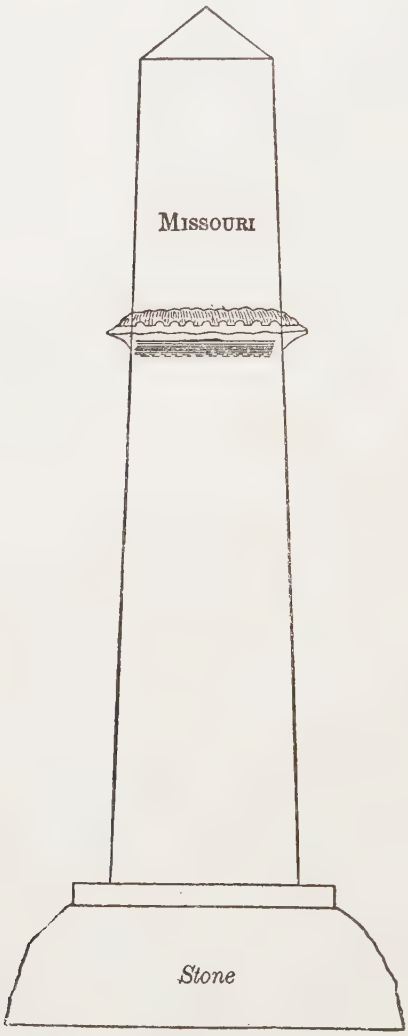
H. B. Hendershott,
R. W. Wells.

November, 1849.

*48 * And said reports not having been excepted to by either of the parties, they are therefore respectively confirmed and adopted by this court. From said reports, it appears that the old northwest corner of the Indian boundary line, made by John C. Sullivan in the year 1816 (and referred to in our former decree), is found to be at forty degrees thirty-four minutes and forty seconds of north latitude, and at about ninety-four degrees thirty minutes of west longitude from Greenwich; that at said "northwest corner" was planted a large cast-iron monument, weighing between fifteen and sixteen hundred pounds, four feet six inches long, squaring twelve inches at its base, and eight inches at its top. This monument is deeply and legibly marked with the words (strongly cast into the iron) "Missouri" on its south side, and "Iowa" on its north side, and "State Line" on the east.

And this court doth adjudge and decree, that said monument doth mark and witness the true northwest corner of the Indian boundary lines, as run by John C. Sullivan, in 1816. And the precise corner is hereby established and declared to be in the center of the top of said monument.

Said reports further show, that from the monument a line was run due west, on a parallel of latitude, to the eastern bank of the Missouri River; which line appears, by the field notes accompanying the reports, to be sixty miles and sixty-one chains in length. And it further appears, by the reports and field notes, that the commissioners caused to be planted cast-iron pillars in the line running west from the old northwest corner, at intervals of ten miles apart, with the word "Boundary" cast in the iron, on the east side and on the west side of said pillars; and the word "Iowa" facing on the north; and the word "Missouri" facing on the south. That in running west, one such pillar was planted at the end of ten miles from the old northwest corner; another at the end of twenty miles; a third


MISSOURI
Stone
Scale 1/12

at the end of thirty miles; a fourth at the end of forty miles; and a fifth at the end of fifty miles. And at the end of sixty miles was planted a monument similar to that erected at the old northwest corner, marked "Missouri" on its south side, "Iowa" on its north side, and "State Line" on the east. This monument stands sixty-one chains east of the eastern bank of the Missouri River, on firm ground, the bottom lands beyond being soft and subject to overflow; for which reason the monument was planted so far east of the river. From this last monument, the line runs due west, on a parallel of latitude, through a cottonwood-tree thirty inches in diameter, notched on the east and west sides, and marked with the letter "I." on the north, and the letter "M." on the south. And on
*49 * the bank of the Missouri River, sixty-one chains west of the iron monument last planted, a wooden post is set in the ground, with two cottonwood pointers,—one of ten inches diameter standing S. 67° E. 6 links; and the other at N. 21° W. 12 links from the wooden post. And said line having been run and marked according to our former decree, it is therefore now adjudged and decreed, that the true and proper boundary line between the States of Missouri and Iowa, extending west from the centre of the monument standing at Sullivan's old northwest corner, runs through the centre of the five iron pillars and the monument near the Missouri River; and through the cottonwood tree above described; and through the centre of the wooden post planted by the commissioners on the eastern bank of the river; and then due west on a parallel of latitude to the middle of the Missouri River.

And it further appears from the report of said commissioners, that, pursuant to our former decree, they had ascertained and re-marked Sullivan's line, as run and marked by him in 1816, extending eastwardly from the old "northwest corner," above described and established. Sullivan's line, as run and marked in 1816, from said corner east, to the Des Moines River, was found not to be a due east line; but that more or less northing should have been made in the old line. Nor is it a straight line, as sudden deviations amounting to from one to three degrees frequently occur; and it rarely happens that any two consecutive miles pursue the same direction. It also appears, that, if the whole line was reduced throughout to a straight line, its southing would be about two degrees from a due east line.

The length of this line is one hundred and fifty miles fifty-one chains and eighty links, from the old northwest corner to the western bank of the Des Moines River. At the end of each intermediate space of ten miles, on tracing Sullivan's line from the old northwest corner eastwardly, cast-iron pillars were planted, of a similar description to those erected in the western part of the line between the old northwest corner and the monument near the Missouri River. These pillars were planted in Sullivan's line as found at the particular point; but as the line was bending in the ten mile spaces between the pillars, it was found necessary to erect wooden posts, at the termination of each mile, in order to mark the line with more accuracy. In the prairies the mile posts are marked with the letters "B. L." facing the east, the letter "I." facing the north, and the letter "M." facing the south; and the number of the mile is marked on the west face of
*50 the post. Where timber * exists, the number of the mile is marked on witness-trees or pointers, with the letter appropriate to each state; there being one tree marked on each side of the line, whenever it was possible so to do. The foot of each witness-tree is marked with the letters B. L.

In all cases where posts are set in mounds, the pit is invariably nine links west, to designate it from other surveys.

At the end of the one hundred and fiftieth mile, no iron pillar was planted, because at fifty-one chains west of this point, the Des Moines River was reached; and there, according to our former decree, a large monument was planted, of similar description to that placed at the old northwest corner, with the words "state line" facing the west, the word "Missouri" facing the south, and the word "Iowa" facing the north.

And the re-marking of Sullivan's line as above set forth, partly with wooden posts at the termination of each mile, having been submitted to the counsel of the parties, it was by them deemed sufficient, because the public surveys of the lands of the United States are to be governed and closed on said line as run by the commissioners; and therefore private titles will be established on both sides, the state line being the dividing boundary of such private rights. And in these views of the counsel the court concurs. It is therefore adjudged and decreed, that Sullivan's line is established to run through the wooden mile posts and the cast-iron pillars planted ten miles apart on said line; and that the true and proper dividing line between the States of Missouri and Iowa, east of the monument erected at the "old northwest corner," begins at the centre of said monument, and runs eastwardly (southing about two degrees of a true east line,) through the centre of each wooden post and iron pillar, to the centre of the monument erected on the bank of the Des Moines River. And it is further adjudged and decreed, that a straight line from one mile post to another, and from a mile post to a pillar, and from the last mile post to the monument on the bank of the Des Moines River, is the true and proper line, and that such straight line shall conclude all other marks. And it is further adjudged and decreed, that a line extended north eighty-seven degrees thirty-eight minutes east, from the centre of the monument erected on the bank of the Des Moines River to the middle of said river, is the true and proper boundary line between the States of Missouri and Iowa west of said monument.

And this court having had submitted to its consideration what amount of compensation should be allowed to the different commissioners, and to the surveyors employed by them, for services performed in running and mark-
*51 ing the line in controversy; * and also the amount of expenses incurred in performing the duties imposed on said commissioners by our former decree; and these matters having been referred to the clerk of the court to ascertain the proper compensation and charges, and he having reported thereon; and also on the other costs and charges incident to the suit: and said report not being excepted to, is in all things confirmed, and which report is in the words and figures following, to wit:—

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Pursuant to an order of this honorable court made the 12th instant, in the case of the State of Missouri and the State of Iowa, now pending on bill and cross bill, the undersigned, after a careful examination of witnesses and all the sources of information within his reach, respectfully reports:—

1. That the $8 per diem, which the commissioners agreed to pay each of the surveyors in the field, is a fair and reasonable compensation for their labors.

2. That $10 per day to each of the three commissioners while engaged in this duty is a fair and reasonable compensation for their services;—and that a further per diem of $2 to each of the two commissioners engaged in the field would be a reasonable and proper allowance on account of their personal expenses.

3. That the statement of the expenditures by the commissioners, and of their purchases, appears to be very moderate and reasonable.

4. That the whole expense of the survey amounted to $10,880.41.

5. That each of the said states advanced $2,000.

6. That the commissioners realized from sales of camp furniture $13.15.

7. That the instruments purchased by the commisioners for the survey (which cost $247.22) have been retained by them for safe keeping, subject to the order of this court.

8. That the fees now due to the clerk of this court, and up to this term, by both parties in this case, amount to $48.67.

Lastly. That in a detailed account, stated upon the preceding basis and hereto appended, each of the said states is charged with $3,457.96½, being a moiety of the balance ($6,867.26) due on the survey, and a moiety of the fees ($48.67) now due the clerk of this court.

All of which is respectfully submitted by

WM. THOS. CARROLL,
Clerk of Supreme Court, U. S.

17 *December*, 1850.

*52 * *The States of Missouri and Iowa, in Account with the Adjustment of the Boundary Line between them.*

	Dr.
To 22 cast-iron monuments	$ 386.95
" Freight, transportation, and expenses on same	246.40
" Camp furniture, provisions, expenses in going to and returning from the line, and upon the line, postage, stationery, hire of horses, expenses in going to and returning from Iowa City, Jefferson City, and St. Louis	826.92
" Wages to hands in the field	1,718.92
" Wm. Dewey, surveyor, for 184 days, at $8 per day	1,472.00
" Robt. Walker, surveyor, for 183 days, at $8 per day	1,464.00
" Robert W. Wells, commissioner, for 15 days, at $10 per day	150.00
" William G. Minor, commissioner, for 177 days, at 12 per day	2,124.00
" Henry B. Hendershott, commissioner, for 187 days, at $12 per day	2,244.00
" Sextant, barometer and thermometer, solar compass, and other instruments necessary for the survey	247.22
" Fees now due the clerk in the case pending in Supreme Court U. S.	48.67
	$10,929.08

Contra.	*Cr.*
By Cash received from State of Missouri	$2,000.00
" Cash received from State of Iowa	2,000.00
" Proceeds from sale of camp equipage	13.15
" Balance, of which $3,457.96½ is due by the State of Missouri, and $3,457.96½ is due by the State of Iowa	6,915.93
	$10,929.08

And it appearing to the court here, that there will be due to the clerk of this court, for the duties devolved on him by this decree, and for the services performed by him at this term, the further sum of sixty-three dollars and sixty cents, in addition to the forty-eight dollars and sixty-seven cents stated in his report to be now due him; and it also appearing to the court, that the said clerk should be allowed, for making his report, for carrying on the correspondence incident to this cause and paying * the expense thereof, and also in consideration of any future service to be performed by him in the progress of this cause, the further sum of fifty dollars; it is thereupon ordered and decreed, that said commissioners Hendershott and Minor, do pay to the clerk of this court, in full discharge of all costs and charges that have now accrued or that may hereafter accrue for any service done or to be performed by the said clerk, in the progress of this cause, the sum of $162.27 out of the first moneys received by them under this decree.

*53

And it appearing that certain advances had been made by the States of Missouri and Iowa, respectively, to the commissioners, and said advances having been credited, it now appears that the State of Missouri is bound to pay the further sum of $3,514.76½; and that the State of Iowa is bound to pay the further sum of $3,514.76½ of the charges and costs of the controversy.

And it is ordered and decreed, that the State of Missouri pay over the said sum of $3,514.76½, and that the State of Iowa pay over the said sum of $3,514.76½, to the commissioners, Henry B. Hendershott and William G. Minor, in final and full discharge of their portions, respectively, of said costs and charges.

And it is further ordered and adjudged, that said commissioners receive the several sums of money, and distribute and pay over the same to those entitled thereto, according to the report of the clerk of this court.

And it also appearing that certain instruments purchased by the said commissioners are retained by them, subject to the order of this court, it is further ordered that the commissioners dispose of the said instruments at such times and places, and on such terms, as to them may seem most advantageous for the interests of the parties to this suit; and that they pay the proceeds of the sales into the treasuries of the said States of Missouri and Iowa, respectively, that is to say, one half of the proceeds into each treasury, and take receipts from the proper officers for the moneys paid.

And it is further ordered, that said commissioners, Hendershott and Minor, report to the next term of this court the manner in which they have executed the duties hereby imposed upon them; and to which end this cause is kept open.

And it is ordered, that the clerk of this court do forthwith transmit to his Excellency, the Governor of the State of Iowa, a copy of this decree (including the reports of the commissioners, surveyors, and clerk, together with a copy of the field notes of said surveyors), duly authenticated under the seal of this court.

*54 * And it is further ordered, that a similar copy in all respects be by said clerk forwarded to his Excellency, the Governor of the state of Missouri.

And it is further ordered, that the clerk forward a copy to each of said commissioners, Hendershott and Minor, of the order referring the matter of costs and charges, the clerk's report thereon, and so much of the foregoing decree as respects the costs and charges, for the guidance of said commissioners in the performance of their duties in this respect.[1]

[1] For the succeeding phase of this case see *Missouri* v. *Iowa* (160 U. S. 688), *post*, p. 1173.—Editor.

State of Florida, Complainant, v. State of Georgia.

Supreme Court of the United States, 1850.

[11 *Howard*, 293.]

A bill by the State of Florida against the State of Georgia ordered to be filed, and process of subpœna directed to be issued against the State of Georgia.

MESSRS. JOHNSON and WESTCOTT, solicitors for the complainant, moved the court for leave to file the bill of complaint in the cause and for a writ of subpœna, or such process as to the court may seem proper. Whereupon this court, not being now here sufficiently advised of and concerning what order to render in the premises, took time to consider.

On consideration of the motion made in this case yesterday, by the solicitors for the complainant, it is now here ordered by the court that this bill of complaint be filed, and that process of subpœna be, and the same is hereby, awarded, as prayed for by the complainant, and that said process issue against "The State of Georgia."

State of Florida, Complainant, v. State of Georgia.

Supreme Court of the United States, 1854.

[17 *Howard*, 478.]

In cases in which this court has original jurisdiction, the form of proceeding is not regulated by act of congress, but by the rules and orders of the court.

These rules and orders are framed in analogy to the practice in the English court of chancery. But the court does not follow this practice, where it would embarrass the case by unnecessary technicality or defeat the purposes of justice.

There is no mode of proceeding by which the United States can bring into review the decision of this court upon a question of boundary between two States. Justice therefore requires that the United States, which represent the rights and interests of the other twenty-nine states, should have an opportunity of being heard before the boundary is established.

The attorney-general having filed an information, stating that the interests of the United States are involved in the establishment of the boundary line between Florida and Georgia, he has a right to appear on behalf of the United States and adduce proofs in support of the boundary claimed by them to be the true one, and to be heard at the argument.

The United States will not, by this proceeding, become a party in the technical sense of the word, and no judgment will be entered for or against them. But the evidence and arguments offered, in their behalf, will be considered by the court in deciding the matter in controversy.

Each party is at liberty to cause surveys and maps to be made. But the court does not deem it advisable to appoint persons for this purpose.

In 11 How., 293, it is reported that the State of Florida filed a bill in this court, in the exercise of its original jurisdiction, against the State of Georgia to establish a boundary between them. The State of Georgia answered, and other proceedings were had; but the case was not yet at issue, nor was all the testimony taken upon which the parties proposed to rely.

At the present term, the attorney-general appeared in court and filed the following information, moving at the same time for leave to intervene on behalf of the United States for the reasons stated in the information.

Now, on this 15th day of December, 1854, Caleb Cushing, attorney-general of the United States, in his proper person comes here into the court, and for the said United States gives the court to understand and be informed, that
*479 a certain bill of complaint * is pending in said court, by or in behalf of the State of Florida, complainant, against the State of Georgia, defendant, wherein is in controversy a certain portion of the boundary line between said States, and of the lands contiguous thereto.

That by Mariano D. Papy, attorney-general of the State of Florida, formal notice in the name and behalf of said State has been given to the United States that the matter of said bill is of interest and concern to the said United States.

That, by inspection of said bill of complaint, it appears that the State of Florida alleges that the portion of boundary line in question should run, commencing at the junction of the Flint and Chattahoochee Rivers, and thence in a straight line to a point at or near a monument commonly called Ellicott's Mound, at the assumed head of the River St. Mary's, which line has been surveyed by the surveyors of the United States, and is known as McNeil's line, or howsoever otherwise the same may be described or designated.

That in said bill of complaint the State of Florida further alleges, that the State of Georgia pretends that, commencing at the Junction of the Flint and Chattahoochee Rivers, as aforesaid, the said line should run to a point called Lake Spalding, or a point called Lake Randolph.

It further appears that the said points of Lake Spalding and Lake Randolph are situated about thirty miles to the south of said Ellicott's Mound, and the effect will be, if the pretence of the State of Georgia be sustained, to transfer to said State of Georgia a tract of land in the shape of a triangle, having a base of some thirty miles, and equal sides each of the length of about one hundred and fifty miles, comprehending upwards of one million two hundred thousand acres of land, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has accordingly been sold and patented by the government as of the territory of East Florida acquired from Spain.

And for the information of the court herein, the attorney-general files, annexed to this motion:—

1. A certified copy of the (cautionary) traverse line so surveyed in 1825, by said McNeil.

2. A certified copy of the field-notes of said traverse line so surveyed.

3. A certified copy of the map of the (cautionary) true line, plotted from traverse line, by said McNeil.

4. An official copy of diagram of surveyor-general of the United States for Florida, of surveys of public lands of United States in said State, to September 30, 1853.

*480 Whereupon, and in consideration of the interest and concern * of the

United States manifestly apparent in said bill of complaint, the said attorney-general of the United States prays the consideration of the court here, and moves the court that he be permitted to appear in said case, and be heard in behalf of the United States, in such time and form as the court shall order.

This motion was opposed by the States, and was argued by the *Attorney-General,* in behalf of the United States; by *Mr. Badger* and *Mr. Berrien,* on behalf of the State of Georgia, and by *Mr. Wescott* and *Mr. Johnson,* on behalf of the State of Florida.

Upon a question of this character, where "the file affords no precedent," the reporter would be pleased if he could report the arguments of counsel *in extenso;* but want of room compels him to submit to the reader only the following condensed and imperfect sketch of the respective arguments.

Mr. Cushing began with a general view of the subject of intervention, how it was considered in other countries, Spain, France, and England, and particularly the latter; and how far the English doctrines had been recognized in the United States. He then passed from the subject of intervention between private persons to cases where the attorney-general interfered, both in England and this country. He then considered the effect of the act of congress (1 Stats. at Large, 93,) establishing the office of attorney-general, and making it his duty "to prosecute and conduct all suits in the supreme court in which the United States shall be concerned;" and contended that, if the government cannot be heard in this case by intervention, it cannot be heard at all.

His argument under the 15th and 16th heads is given entire.

15. If there were no precedents to justify the right claimed for the attorney-general, then the court should make one, in deference to the great principle of equity laid down by Lord Cottenham, in Taylor *v.* Salmon, that it is the duty of the court of chancery "to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise; and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy." Taylor *v.* Salmon, 4 Mylne and Craig, 141.

This court has repeatedly decided that it has ample power to regulate chancery practice for the new and purely American question, of suits in equity between States; subject, of course, to the control of congress in this respect.
*481 Grayson *v.* State of * Virginia, 3 Dal. 320; Huger *v.* State of South Carolina, 3 Ib. 371; State of New York *v.* State of Connecticut, 4 Ib. 1; State of New Jersey *v.* State of New York, 5 Pet. 283; State of Rhode Island *v.* State of Massachusetts, 12 Pet. 657.

It can as well provide rules in equity, according to the exigencies of the case, for this first example of the more complex contingency of the collateral interest of the United States in a suit between two States, as it could for the primary and simple contingency of the suit between two States of itself.

If there be no rule in the files applicable to the case, then it is the very time for the court to exercise the double equity power (reversing the order in which Bacon describes it,) *tam supplendi defectum legis quam subveniendi contra rigorem legis.*

16. It will not answer to say that the United States may appear in the name of the State of Florida.

§ 1. If so, then the condition of the United States, in the premises, is pre-

carious, depending on the discretion of the State of Florida, or of any other State which may stand in like circumstances.

Self-defense on the part of the government will no longer be its right, but a favor to be granted or withheld by any litigant State. The essence of a right is, that it may be exercised contentiously, adversely. *Ubi jus ibi remedium.* Right is a thing determinate, fixed, established. *Rego, rectum, regula,*—all belong to the same set of ideas.

§ 2. The proposed appearance for the United States is not a volunteer act; for the State of Florida demands of the general government to intervene. The attorney-general of that State officially notifies the attorney-general of the United States of their interest depending on this question with Georgia.

But a case might arise in which neither of two or more litigant States desired the presence of the United States.

The matter before the court is, therefore, of a legal principle to be determined, not of a privilege to be conceded or of one enjoyed indirectly under favor of a State.

§ 3. Nor is the possibility of distinct and separate rights, on the part of the United States, a suggestion or supposition merely.

The United States have granted certain lands, by patent, to individuals, or by statute cession, to Florida, which, according to the claims of Georgia, belonged to her, not to the United States. Here is responsibility of the latter to its grantees.

The warrantor comes in because of his responsibility to his grantee, but also in order to see that the case is fully and well tried, with all just defenses fully before the court, either technical or of the merits.

*482 * § 4. The rights of the United States might be prejudiced in a suit between two States through the forms of law.

The constitution provides (Art. 1, § 3) as follows:—

"3. New States may be admitted by the congress into this Union: but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the congress."

By the constitution, also, (Art. 1, § 10,) "No State shall, without the consent of congress, . . . enter into any agreement or compact with another State."

These two clauses of the constitution are *in pari materia,* and to be construed together; and they establish that two States cannot change their common boundary without consent of congress.

The United States have a general interest in the question of the boundaries of States, because of sundry political or legislative relations of the subject: as, for instance, apportionment of members of the house of representatives, collection districts, judicial districts, and many other things having reference to the boundaries of States.

Treaty rights may likewise be involved, as in the present case, where the line in dispute is defined by the treaty of 1783 between the United States and Great Britain, art. 2, (8 Stats. at Large, 81,) and by the treaty of 1795 between the United States and Spain, art. 2, (8 Ib. 140.) These treaties are a part of that supreme law, which it is the peculiar duty of the United States, its officers, and its tribunals, to maintain and execute.

Special acts of congress may be in question, as here in the present case.

By the act of March 3, 1845, for admitting the State of Florida into the Union, (5 Stats. at Large, 743, ch. 63, § 5,) "said State of Florida shall embrace

the territories of East and West Florida, which, by the treaty of amity, settlement, and limits between the United States and Spain on the 22d day of February, 1819, were ceded to the United States."

And by the 7th section of that act, the State of Florida was admitted into the Union upon the express condition that the State shall never interfere with the primary disposal of the public lands within the State, nor levy any tax on the same whilst remaining the property of the United States.

The attorney-general, in proposing to intervene here to protect the
*483 interests of the United States, desires to do so, not as a technical * party: not as joining with the one or the other party; not in subordination to the mode of conducting the complaint or defense adopted by the one State or by the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact by either or both; but free to coöperate with, or to oppose both, or either, and to bring forth all the points of the case according to his own judgment, whether as to the law or to the facts; for *ex facto oritur jus.*

As the States of Florida and Georgia cannot, by any direct agreement or contract between them, without the consent of congress, change the boundary of Florida, as established by the said act of congress, it follows that they ought not to be permitted to alter that boundary in the suit pending, either by possible mispleading, mistake in pleading, omission of pleading, or direct confession, or by omission of evidence, by any of which means the true, faithful, and full view of all the facts pertinent to the question might be withheld from the view and judgment of the court.

As the public domain and jurisdiction in East and West Florida, were acquired from Spain by the United States, and thereafter the territory so acquired by the United States was admitted into the Union with its boundaries so defined, and with the reservation to the United States of the disposal of the public lands, and that they be free of taxation by the State whilst they remain the property of the United States, the conclusion seems to be inevitable, (supposing this court to have original jurisdiction on the direct question of the primitive right of the boundaries,) that the attorney-general ought to be suffered to intervene fully and completely, to protect the interests of the United States, without being prejudiced by any acts or omissions of either of the litigant States, whether Florida or Georgia.

Otherwise, and without power to show the possible mistakes, errors, omissions, mispleadings, insufficient pleadings, and improper admissions or agreement of the two, or of the one or the other, the means of protecting the public interests would be wholly inadequate to the end; and two States might, by their own acts, by pleadings, or their agreement entered of record in the suit, change the true and lawfully established boundary between them to the direct prejudice of the interests, rights, and laws of the United States.

It is on this consideration, among others, that the whole doctrine of equity, as to the necessity of proper parties in court, stands. Each party interested is to defend his own rights, lawfully according to his view of their merits, with-
*484 out being * prejudiced through the acts or omissions of any co-party. See Story's Equity Pleadings, ch. 4.

§ 5. If the United States are not present, no decree in the case can be made to the prejudice of the United States.

Mr. Badger and *Mr. Berrien,* on behalf of the State of Georgia, opposed the motion, upon the following grounds, namely:—

The object of the motion, as appearing on its face and as explained by the

brief of the attorney-general, is: That he, on the part and as the representative of the United States, may be made a party to this suit in fact, but not in form; may exercise all the rights of a party without becoming a party; may be, without seeming to be, a party.

On the part of the State of Georgia, it is insisted that the motion cannot be granted, because,

1. Under the constitution, this court has not and cannot have any jurisdiction of this cause, but as a controversy between States of the Union; and the appearance of any other party therein would determine the jurisdiction and put the cause out of court.

2. To allow the United States to become in fact a party, without appearing on the record to be one, would be a mere evasion of the constitutional inhibition, involving all the guilt of a deliberate violation of that instrument, accompanied and enhanced by an artful contrivance to conceal it; a violation in substance though not in form, and therefore utterly unworthy of this high constitutional court.

3. If the motion should be granted, the United States would judicially appear on the record to be a party, though not made so by the process or in the manner usual in this court; and, therefore, the jurisdiction of the court would, at once, be gone.

4. There is no precedent or example of any such intervention as is here sought to be obtained.

We put aside all the references in the learned brief to proceedings under the civil law, as being utterly irrelevant to the question; for that law neither gives the rule of judgment nor regulates the practice of this court. This cause is one of equity jurisdiction, governed, as to the principles of decision, by the law of courts of equity, and by the statutes and treaties of the United States, and as to the course of proceeding by the practice of the court of chancery in England, in subordination to the paramount authority of the rules of this court. If, therefore, it could be demonstrated that what the attorney-general asks is, and always has been, allowed as of right or of grace in all the courts of
*485 France, the German States, and other countries * of continental Europe, we should not be advanced one tittle towards showing the right or the propriety of allowing it to be done here.

In England, no intervention, whether voluntary or involuntary, if that term may be properly used in this connection, is known, except by the intervener becoming a party, and submitting his rights in the matters in dispute to the decision of the tribunal, so that its judgment shall conclude those rights. There, whatever may be the case in other European countries, no process has ever been applied or understood, in virtue of which one not a party to the record may interpose between two litigants, contest their rights or the rights of one of them, embarrass and obstruct their proceedings, direct or control their management of the controversy, and taking all the chances of obtaining a judgment against one of them, binding upon the rights of both, may retire at the conclusion of the contest with his own rights unaffected by a judgment adverse to his claims.

On the contrary, where third persons are found to have such an interest in the subject of litigation that they ought to be heard before a judgment, these persons are required to be made parties, to the intent that all persons in interest may be concluded by the final award of the tribunal. This is emphatically true in regard to equity proceedings in the court of chancery, and not less in regard to the crown than to private persons. This is abundantly evident from cases cited by the attorney-general in support of his motion. For example:—

(The counsel then cited and commented on the cases of Penn *v.* Baltimore, 1 Ves. Sen., 444; Hovenden *v.* Annesley, 2 Sch. & Lef. 607; Attorney-General *v.* Galway, 1 Molloy, which established that the king must be a party.)

5. The United States is not "concerned" in the questions involved in this cause, within the meaning of the act of congress prescribing the duties of the attorney-general; that term means, concerned in interest, and is exactly equivalent to "interested," and cannot be used in any other meaning in reference to an impersonal sovereignty like the United States. The cases cited show what is the nature of that interest of the king which makes it necessary in England that he should be a party; for example, a contest between two of his grantees claiming at rents of different value, where it appears upon record that the success of him who holds at the smaller rent will be immediately and certainly prejudicial to the crown revenue, and like cases.

Here no interest of the United States appears on the record. It is a question merely as to the boundary between two States. However resolved, the
*486 United States gains no right and suffers * no loss, neither of the States holding under the United States as a tenant, or owing any payment or other duty to the United States, for or on account of her possession or jurisdiction. The only parties having any seeming interest in the question, besides the two States, are those having lands upon the disputed territory, whose titles may be, but are not necessarily, affected by a judgment against the plaintiff. The United States have no interest, real or apparent, and therefore are not a necessary or even a proper party to the controversy. The cases referred to by the attorney-general, in which the United States are represented by him officially in this court, are all consistent with the view here taken. Actions, for instance, brought in the name of heads of departments as such, are suits of the United States, as truly as an information in the name of the attorney-general, or the master of the crown office, is, in England, the king's suit, &c.

6. Supposing the United States to have some interest, indirect, consequential, and contingent, in the decision of the question in the cause, and supposing that in England such an interest of the crown might be represented by the attorney-general there, it doth not follow that the attorney-general here can assume, *virtute officii,* to represent such interest.

7. Even an act of congress could not enable him to intervene for the United States in this suit in this court. For, if made a party, either the court would proceed with a party, not a State before it, in which case, according to the constitution, this court cannot hold original cognizance, or dismiss the bill for want of jurisdiction; and thus a jurisdiction conferred by the constitution expressly and exclusively upon this court would be withdrawn from it by force of an act of congress, and in defiance of the constitution.

Upon the whole, it clearly appears that the court cannot grant the motion of the attorney-general.

What then remains to be done? If the United States have any consequential interest which ought to be represented, the court cannot, as did the lord chancellor in Reeve *v.* The Attorney-General, 2 Atkins, 223, dismiss the bill in order that proceedings might be taken in another court, for there is no such court; this court, and this only, having cognizance of the controversy between the two States; and the court cannot decline the exercise of its exclusive jurisdiction over the two principal parties, because of such incidental and subordinate interests.

We submit, as a necessary and inevitable consequence, that the court must proceed with the cause between the present parties, without intervention, formal or informal, of any third party whatever.

*487 * *Mr. Westcott* and *Mr. Johnson,* on behalf of the State of Florida, opposed the motion for the following reasons:—

1. That the jurisdiction of this court, in this case, is founded exclusively upon those clauses of the federal constitution which declare that "the judicial power of the United States shall extend" "to controversies between two or more States," in connection with that clause which provides that "in those cases (referring to the cases enumerated in the constitution, as being of federal judicial cognizance,) in which a State shall be a party, the supreme court shall have original jurisdiction."

2. That the clauses of the federal constitution, cited, extending the federal "judicial power" "to controversies between two or more States," refer exclusively to cases in which States only are parties therein, and make such cases a distinct and separate class from all the other cases enumerated in the constitution; and they do not reach or apply to any case, whether at law or in equity, wherein there is a co-plaintiff or a co-defendant, other than a State, with a State or States; and if it be conceded that in a suit in equity, in this court, under any other of the constitutional provisions, a complainant hath a right to join the United States, or any corporation, or officer, or individual, interested in such suit, as a party complainant or defendant; or that the attorney-general of the United States hath authority to make the United States such party; or that this court possesses power to order the joinder as parties of all interested, as in an ordinary case in equity, in the English, or in our state chancery courts; it is nevertheless insisted by complainant, that in this "controversy between two States," such courses cannot be pursued; and this, though an act of congress allowing the same had been or should be passed.

3. That if the court should hold that the point secondly above stated is erroneous, and that the joinder of another party, not a State, with the State of Florida, as co-complainant, or with the State of Georgia, as co-defendant, would not affect the jurisdiction of this court over the present case, as invoked by the complainant in the bill filed, under the clauses of the federal constitution above cited, (and especially referred to in said bill,) then it is insisted that the complainant cannot, without an act of congress authorizing the same, make the United States a party to this bill; even if the consent of the attorney-general of the United States is given therefor; and that, without such law, this court doth not possess the power to order, (either *ex mero motu,* or upon the express application of said attorney-general, or at the instance of either or both of the litigant States,) such joinder of the United States as a party complainant or party defendant in this case.

*488 * 4. That insomuch as the United States, in the admission, by act of congress, of the Floridas, as a sovereign and independent State into the federal union, yielded to that State all rights of sovereignty or "eminent domain" they had within the boundaries of the States, as declared by the state constitution: and thereby became a mere proprietor of the unsold and ungranted lands included within said boundaries; they have not now any higher or other prerogatives, in reference to this "controversy," than a citizen or alien proprietor of land situate on the territory in dispute between the two litigant States, the titles of said proprietors of such lands being derived from the United States; and consequently, if the claim of the State of Georgia is sustained, will be destroyed; nor than the several thousand residents of said territory, who have, up to this time, been considered resident citizens of the State of Florida, and have exercised the rights, privileges, and immunities of such citizenship, and whose state allegiance will be changed by a decree of this court confirming the claim of the State of Georgia; and the complainant insists that the rights and interests of all said proprietors,

(including the United States,) and of said residents, are, in this regard, entirely subordinate to those of the State of Florida, now in contest, and are subject to her action as their political sovereign in the premises.

5. That by reason of the anomalous character of a suit at law or in equity "between two or more (sovereign and independent) States," involving their rights of sovereignty, as well as of property; instituted in virtue of a federative compact, before a judicial tribunal, by legal process, summoning a defendant State to the bar of the court to submit her claims, and abide by the arbitrament and decree of that tribunal, from which decision there is no appeal; most of the rules of procedure in ordinary cases before the courts of common law or of chancery in England, are inapplicable to such suit, ineffective as aids to counsel in its prosecution or defense, and useless to the court in its investigation of the "controversy," or in its arbitrament and decision; and, by consequence, additional, different, and extraordinary *formulæ* of procedure, must be prescribed by the court, and conformed to by the parties, in every "controversy" before this court, "between two or more States."

6. That in the adoption of such necessary, additional, different, and extraordinary rules of procedure, "in controversies between two or more States," brought before this court, it is not restricted to guides furnished by the rules of procedure of the English common law or chancery tribunals, (wherein no like case is to be found;) nor, in the determination of such case, is this court *489 limited to the consideration of the principles supplied * by the English systems of jurisprudence, to which such case is unknown, and the principles controlling it are above the reach and beyond the scope of those systems: and therefore, whensoever a departure from English rules and theories will facilitate and speed the settlement of the controversy, will aid in the better protection of all just rights and interests involved, whether of the States who are the "parties," or of others not "parties," this court may rightfully invoke systems of jurisprudence and rules of procedure, in the tribunals of other countries, and with especial propriety resort to the principles and rules of the "civil law" of the continent of Europe, (the original source of much of the common law and most of the chancery law of England, but of more enlarged and liberal applicability;) or, this honorable court rightfully may, in a case so peculiarly and exclusively American, and its jurisdiction whereof is so entirely based on the constitutional compact between the States, devise, adopt, and enforce such original rules of procedure, appropriate to such case, as, in its judgment, may best tend to "establish justice," "insure domestic tranquillity," and promote the other declared objects of that compact; and this, though there cannot be cited any transatlantic precedent or example therefor.

7. That, as there are involved in this case not only the rights of sovereignty and of property, in controversy between the two litigant States, but also important rights and interests of others not parties in the records, founded on the identical facts and law to be submitted to the court, as the basis of its decree therein, all which rights and interests of those not parties will necessarily be affected if not conclusively determined by said decree; the complainant concedes the rightfulness and propriety of this court so devising the rules of procedure in this case, as to allow those immediately interested, though not parties, the privilege and opportunity of maintaining and defending their rights and interests, and of adducing proofs, and of being heard in argument before this court to that end; and that the same should be done in such liberal form and to such full extent as may be consistent with the progress of the cause, without embarrassment or prejudice to the parties, and as will not abridge or compromit the rights of the respective parties to the exclusive control and management of the mode and means of

enforcing their own rights and interests; and the complainant also concedes, that insomuch as the title of the United States to some 1,200,000 acres of unsold and ungranted lands claimed to be what are usually designated as "public lands of the United States," of the estimated value of $1,200,000, and of which the United States are the constitutional trustees for the several States of the
*490 confederacy, and the people thereof; and, insomuch as the * liability of the federal treasury to refund large amounts paid into it as purchase-money, by patentees of the United States, for lands heretofore sold by the United States to them, and also to pay large sums for improvements and for damages, will be affected and in some respects determined conclusively, if the claim made by Georgia (suggested in the bill of complaint) be established by this court, which amounts and sums will probably exceed $1,500,000; this complainant, whilst she denies any special prerogative appertaining to the United States as a government, or any special privilege of the attorney-general of the United States, *virtute officii,* to interfere in this case, except as aforesaid; yet, because of all said premises above set forth, and especially for the reason that the United States cannot be made a party complainant or defendant in this case, doth concede that the rules of procedure so adopted by this court may rightfully and properly be extended in this case, as aforesaid, to the United States, and that the attorney-general may be allowed to "intervene," as he hath applied to the court, under such restrictions as above suggested by complainant, or such others as may be deemed proper by this honorable court.

8. That if it be held by this honorable court, that the complainant is in error as to the points above presented; and that the United States may be made a party complainant or a party defendant in this case, either without an act of congress therefor, or by authority of an act that may be passed therefor; and that such joinder is necessary for the protection of the admitted important rights and interests of the United States involved therein as aforesaid; then, this complainant respectfully insists, that if no act of congress be requisite to enable them to be made such party, this honorable court ought not to dismiss the said bill of complaint, for that the complainant did not join them as such party in said bill, but should stay proceedings and the decision in the case till the same be done, under an order of this court therefor; and if such act of congress be deemed proper and necessary, that a suggestion thereof be made in this case by this honorable court, in an order to stay proceedings in the case, until the executive and legislative departments of the federal government may be enabled to adopt such course in that behalf, upon the application of this complainant, as they may respectively deem advisable to that end or otherwise in the premises.

Mr. Chief Justice TANEY delivered the opinion of the court.

The court proceeded to dispose of the motion made by the attorney-general for leave to be heard on behalf of the United States, in the suit between the State of Florida and the State of Georgia.

*491 * It appears that the boundary line between the two States is in controversy and a bill has been filed in this court by the State of Florida to ascertain and establish it.

The attorney-general has filed an information, stating that the United States are interested in the settlement of this line; that the territory in dispute contains upwards of one million two hundred thousand acres of land, and was ceded to the United States by Spain as a part of Florida; and that the United States have caused the whole of it to be surveyed as public land and sold a large portion of it, and issued patents to the purchasers. And upon these grounds he asks leave to

offer proofs to establish the boundary claimed by the United States, and to be heard, in their behalf, on the argument.

The motion is resisted on the part of the States, and the question has been fully argued by counsel for the respective parties. And as it is, in some degree, a new question, and concerns rights and interests of so much importance, we have taken time to consider it.

If the motion was merely to be heard at the argument, there would, we presume, have been no opposition to it on the part of the States. For it is the familiar practice of the court to hear the attorney-general in suits between individuals, when he suggests that the public interests are involved in the decision. And he is heard, not as counsel for one of the parties on the record, but on behalf of the United States, and as representing their interests. This was done in several instances at the last term, where the United States had sold lands as a part of the public domain, which were claimed by individuals under grants alleged to have been made by France or Spain previous to the cession to this country.

In these cases, however, they were argued by the attorney-general upon the evidence produced by the respective parties. No new evidence was offered on behalf of the United States. And the objection now made is, that he cannot be permitted to adduce evidence in the case, unless the United States are parties on the record; and that they cannot, under the provisions of the constitution, become parties in this court, in the legal sense of the term, to a suit between two States.

We proceed to consider this objection.

The constitution confers on this court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. And it is settled, by repeated decisions, that a question of boundary between States is within the jurisdiction thus conferred.

But the constitution prescribes no particular mode of proceeding, nor
*492 is there any act of congress upon the subject. * And at a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous act of congress regulating the process and mode of proceeding. But the court, upon much consideration, held, that although congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court; and in the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.

There was no difficulty in exercising this power where individuals were parties; for the established forms and usages in courts of common law and equity would naturally be adopted. But these precedents could not govern a case where a sovereign State was a party defendant. Nor could the proceedings of the English chancery court, in a controversy about boundaries, between proprietary governments in this country, where the territory was subject to the authority of the English government, and the person of the proprietary subject to the authority of its courts, be adopted as a guide where sovereign States were litigating a question of boundary in a court of the United States. They furnished

analogies, but nothing more. And it became, therefore, the duty of the court to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.

It is upon this principle that the court appear to have acted in forming its proceedings where a State was a party defendant. The subject came before them in Grayson *v.* Virginia, 3 Dal. 320. And the court there said that they adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable. And they at the same time passed an order directing process against a State to be served on the governor or chief magistrate, and the attorney-general of the State. This was in 1796. And the principle upon which its process was then framed, as well as the mode of service then prescribed, has been followed ever since, with this exception, that in subsequent cases the chancery practice, and not the admiralty, is regarded as furnishing the best analogy. But the power and * propriety of deviating from the ordinary chancery practice, when the purposes of justice require it, have been constantly recognized; and were distinctly asserted in the case of Rhode Island *v.* Massachusetts, 14 Pet. 247, and again in the same case, in 15 Pet. 273, and was recognized in the case of New Jersey *v.* New York, 5 Pet. 289.

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We proceed to apply these principles to the case before us. It is manifest, if the facts stated in the suggestion of the attorney-general are supported by testimony, that the United States have a deep interest in the decision of this controversy. And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded. And if this were a suit between individuals, in a court of equity, the ordinary practice of the court would require a person standing in the present position of the United States, to be made a party, and would not proceed to a final decree until he had an opportunity of being heard.

But it is said that they cannot, by the terms of the constitution, be made parties in an original proceeding in this court between States; that if they could, the attorney-general has no right to make them defendants without an act of congress to authorize it.

We do not, however, deem it necessary to examine or decide these questions. They presuppose that we are bound to follow the English chancery practice, and that the United States must be brought in as a party on the record, in the technical sense of the word, so that a judgment for or against them may be passed by the court. But, as we have already said, the court are not bound, in a case of this kind, to follow the rules and modes of proceeding in the English chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained.

It is evident that this object can be more conveniently accomplished in the mode adopted by the attorney-general, than by following the English practice in cases where the government have an interest in the issue of the suit. In a case

like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the court, in the present suit, there is no possible mode by which that decision can be reviewed or reëxamined at the instance of the United States. They would therefore be as effectually concluded
*494 by the judgment as if they were parties * on the record, and a judgment entered against them. The case, then, is this: Here is a suit between two States, in relation to the true position of the boundary line which divides them. But there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court. For their interests may be different from those of either of the litigating States. And it would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case, and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the constitution, become a party to this suit, in the legal sense of that term, and the English mode of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice.

Indeed, unless the United States can be heard in some form or other in this suit, one of the great safeguards of the Union, provided in the constitution, would in effect be annulled.

By the 10th section of the 1st article of the constitution, no State can enter into any agreement or compact with another State, without the consent of congress. Now, a question of boundary between States is, in its nature, a political question, to be settled by compact made by the political departments of the government. And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without the assent of congress. This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others. And the right and the duty to protect these interests is vested in the general government.

But, under our government, a boundary between two States may become a judicial question, to be decided in this court. And, when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and that decision, when pronounced, is conclusive upon the United States, as well as
*495 upon the States that are parties to the suit. * Now, as in a case of compact, it is, by the constitution, made the duty of the United States to examine into the subject, and to determine whether or not the boundary proposed to be fixed by the agreement is consistent with the interests of the other States of the Union; it would seem to be equally their duty to watch over these interests when they are in litigation in this court, and about to be finally decided. And, if

such be their duty, it would seem to follow that there must be a corresponding right to adduce evidence and be heard, before the judgment is given. For this is the only mode in which they can guard the interests of the rest of the Union, when the boundary is to be adjusted by a suit in this court. For, if it be otherwise, the parties to the suit may, by admissions of facts and by agreements admitting or rejecting testimony, place a case before the court which would necessarily be decided according to their wishes, and the interest and rights of the rest of the Union excluded from the consideration of the court. The States might thus, in the form of an action, accomplish what the constitution prohibits them from doing directly by compact. Nor is this intervention of the United States derogatory to the dignity of the litigating States, or any impeachment of their good faith. It merely carries into effect a provision of the constitution, which was adopted by the States for their general safety; and, moreover, maintains that universal principle of justice and equity, which gives to every party, whose interest will be affected by the judgment, the right to be heard.

Upon the whole, we think the attorney-general may intervene in the manner he has adopted, and may file in the case the testimony referred to in the information, without making the United States a party, in the technical sense of the term; but he will have no right to interfere in the pleading, or evidence, or admissions of the States, or of either of them. And, when the case is ready for argument, the court will hear the attorney-general, as well as the counsel for the respective States; and, in deciding upon the true boundary line, will take into consideration all the evidence which may be offered by the United States, or either of the States. But the court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor. We consider the attorney-general as the proper officer to represent the United States in this court; and that the general government, in bringing before us for consideration the rights and interest of the Union in the question to be decided, does nothing more than perform a duty imposed upon it by the constitution.

*496 And, as the mode in which that duty is to be performed * here is not regulated by law, but must depend upon the rules and regulations prescribed by the court, we shall not embarrass the proceedings by endeavoring to conform them strictly to English precedents and pleadings, and regard the mode in which the information on behalf of the United States has been presented, to be the simplest and best manner of bringing their interest before the court, and of enabling it to do justice to all parties whose rights are involved in the decision.

Mr. Justice McLEAN, Mr. Justice DANIEL, Mr. Justice CURTIS, and Mr. Justice CAMPBELL, dissented.

Mr. Justice CURTIS, dissenting.

It is in accordance with natural justice, and with a principle of jurisprudence, that no one should be affected by a judgment or decree, without an opportunity to present to the court, either by himself or his lawful representative, in some regular and legal course, his allegations and proofs, and to be heard thereon; and, therefore, I should have assented to the application of the attorney-general in

this case, and would willingly concur with a majority of the court in the order they direct to be entered, if I did not find it to be subject to objections too grave for me to disregard, and which careful reflection, even under the influence of the great respect I feel for the opinions of my brethren, has not enabled me to overcome.

I will state, as briefly as I can, what these objections are. In doing so, I shall first examine the nature and effect of the application of the attorney-general, to see whether it is in the power of the court to grant it, as made; and I will then consider whether the order directed by the courts is subject to the same difficulties, in part or in whole.

That application is, in substance, an *ex officio* information, in which the attorney-general of the United States informs this court of the pendency of a suit here, by the State of Florida against the State of Georgia, wherein there is in controversy a portion of the boundary line between those States; that it appears, from an inspection of the bill of the State of Florida, and of the answer of the State of Georgia, that, if the pretensions of the State of Georgia shall be sustained by this court, the boundary line in controversy will be so run as to include within the territorial limits of that State a tract of land of about one million two hundred thousand acres, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has been sold and granted by the United States, as being part of the territory of East Florida, acquired from Spain.

*497 * In support of this information, the attorney-general has filed certain documents and a map; and he prays that, in consideration of the interest and concern of the United States, he may be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court shall order.

The case to which this information relates now stands on the original docket of this court, upon a bill filed by the State of Florida and an answer by the State of Georgia. No replication had been put in, and, of course, no proofs taken.

It is quite apparent, therefore, since the case is not now in a condition to be brought to a hearing, and since much time must necessarily elapse, considering the course of the court and the nature of the controversy and the character of the parties, before it can be put into a state to be heard, that this application of the attorney-general is not designed merely to obtain the privilege of taking part in the hearing of the cause, by making an argument at the bar, upon the pleading and proofs as they may exist when the cause may be set for a hearing, if that time shall ever arrive. It seems to me not consistent with that respect which is due to the attorney-general, to suppose that he has caused the States of Florida and Georgia, by their counsel, to appear here, and has called on the court to listen to and consider elaborate and learned arguments upon questions of constitutional law and general jurisprudence, merely to present the question whether —in the contingency that this case should, at some future day, be brought to a hearing, and in the event that, at that time, the interest of the United States should remain as it is now alleged to be—the court would hear the law officer of the United States, in support of its interests.

Courts of justice make orders and decrees upon actually existing states of fact, not upon what may possibly occur at some period in the future. And this

obvious dictate of ordinary prudence is rigidly obeyed by courts of equity, when acting on subjects like that now before the court.

In England, the sovereign has a great number and variety of interests and rights, which may be affected by decrees of courts of equity. As will be more fully stated hereafter, the attorney-general represents the crown in respect of those rights, and no decree affecting them is made until he has had opportunity to become a party to the suit. But the question, whether he is a necessary party, is raised in the same way and at the same time, as the question whether a private person is a necessary party. And, I believe, we should search in vain for an instance in which any court had made an order in a cause before it was
*498 at issue, * that, if it should come to a hearing, the attorney-general should be heard at the bar.

I have made these observations concerning the nature and objects of this application, because the information does not specify or in any way indicate what particular order it is desired the court should pass. If I felt at liberty to understand it simply as an application to be heard at the bar, by way of argument on the pleadings and proofs of the complainant and the defendant, I should think the proper answer would be, that the court would advise thereon when it was made reasonably certain that the cause would be heard. But I am not at liberty so to view this information, not only for the reasons I have suggested, but because the attorney-general, with becoming frankness, had declared, both orally, at the bar, and in his printed brief, that what he desires passes far beyond this. He has thus made known to the court that he seeks to intervene in the cause in behalf of the United States; and he has explained his understanding of the term intervention, and of the effect of an order of the court allowing it, to be, that he is to come into the cause, "not in subordination to the mode of conducting the complaint or defense adopted by one State or by the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact, by either or both; but free to coöperate with or oppose either or both, and to bring forth all the points of the case according to his own judgment, whether as to the law or the facts; for *ex facto oritur jus.*"

Can this, or any thing like this, be allowed, consistently with the constitution and laws of the United States?

In answering this inquiry, it is necessary to determine what would be the relation of the United States to this controversy if the attorney-general were thus admitted. In my opinion, they would thus become substantially and really, a party to the controversy. I say substantially and really a party, for I quite agree with the majority of the court in thinking that this question is not to be decided according to any strict technical rules, or even viewed solely by the light which they impart. As I consider it, the question is one of constitutional law; and though the constitution was framed and intended to operate in connection with those systems of law and equity existing in our country at the time of its adoption, and many terms in it can be correctly understood only by resorting to the interpretation of those terms in those bodies of law, yet I concede that, in examining this question, we are to look to the substance and nature of the relation to the suit, and not merely to forms and names; and, therefore, I have
*499 inquired whether, if the attorney-general * be admitted on the record in

accordance with the prayer of his information, the United States will be substantially and really a party to this suit? And, in the first place, I think there can be no substantial distinction in this matter between the United States and the attorney-general. If what is done is sufficient to make him a party, the United States is, in substance and in legal effect, a party. The rights and interests which he brings before the court are the rights and interests of the United States. He presents those rights and interests, not as a trustee in whom they are vested; not as specially empowered by law to sue in his own name for the recovery of something belonging to the government; but he acts simply as an attorney and counsellor at law.

The postmaster-general is empowered by law to bring suits in his own name, in the courts of the United States, upon contracts made with him as the head of a department; and the United States, though exclusively interested, is not deemed a party to the controversy. Osborn *v.* The Bank of the United States, 9 Wheat. 855. So an executor or administrator, though he may have no beneficial interest in the cause of action, is deemed the party to the suit for the purpose of jurisdiction. 4 Cranch, 308; 8 Wheat. 668; 12 Pet. 171. But, in these and similar cases the officer or executor has, by law, the legal right of action vested in him.

On the other hand, it has been repeatedly decided, that where a law required a bond to be taken, in the name of a public officer, but for the benefit of individuals, as in case of sheriff's bonds, the person for whose use the suit was brought, and not the obligee in whose name it was brought, was the party to the suit, within the meaning of the constitution. Brown et al. *v.* Strode, 5 Cranch, 303; McNutt *v.* Bland, 2 How. 1; Huff *v.* Hutchinson, 14 Ib. 586.

These decisions go much beyond what I maintain in this case. The rights and interests which the attorney-general desires to assert in this case are in no manner and for no purpose vested in him, any more than the rights and interests of the private parties litigating in court are vested in the attorneys and counsel whose names are on the docket, or who argue the causes at the bar.

He is not what was termed, in the cases of Browne et al. *v.* Strode, and the other cases just referred to, a conduit, through whom the remedy is afforded on a contract made in his name. He is simply a law officer of the government, empowered to act for the United States in this court. In such a case it does not seem to me to admit of a doubt, that whatever is done by him, though in his name, will be done by the United States.

*500 * The case of Georgia *v.* Brailsford, 2 Dal. 402, was a bill by "His Excellency, Edward Telfair, Esquire, governor and commander-in-chief in and over the State of Georgia, in behalf of the said State." The jurisdiction was sustained, as of a suit by the State, and an injunction granted and a trial had at the bar of this court. 4 Dal. 1. Yet, to give the court jurisdiction, a State must be a party on the record. Osborn *v.* The Bank, 9 Wheat. 738. In this case, the court must have considered the State was made a party on the record by a proceeding in its behalf in the name of its chief executive magistrate. So it was declared by the court, in the case of The Governor of Georgia *v.* Madrazo, 1 Pet., 122; and in this last-mentioned case, it was decided, on great consideration, and after examining all the previous decisions, that a claim filed by the governor of Georgia, in his own name as governor, but in behalf of that State, made

the State itself a party to the record, within the meaning of the constitution and laws of the United States.

In Benton, District Attorney of the United States for the Northern District of New York *v.* Woolsey et al. 12 Pet. 27, the district attorney of the United States for the northern district of New York had filed an information in his own name to foreclose a mortgage belonging to the United States. The case came to this court by appeal. In delivering the opinion of the court, Mr. Chief Justice Taney said: "Some doubts were at first entertained by the court, whether this proceeding could be sustained in the form adopted by the district attorney. It is a bill of information and complaint in the name of the district attorney, in behalf of the United States. But upon carefully examining the bill, it appears to be in substance, a proceeding by the United States, although in form it is in the name of the officer. And we find that this form of proceeding in such cases has been for a long time used without objection in the courts of the United States, held in the State of New York; and was doubtless borrowed from the form used in analogous cases in the courts of the State where the State itself was the plaintiff in the suit. No objection has been made to it, either in the court below or in this court, on the part of the defendants, and we think the United States may be considered as the real party, although, in form, it is the information and complaint of the district attorney. But although we have come to the conclusion that the proceeding is valid and ought to be sustained by the court, it is certainly desirable that the practice should be uniform in the courts of the United States; and that, in all suits where the United States are the real plaintiffs, the proceedings should be in their name unless it is otherwise ordered by act of congress."

*501 * Now it is plain, that the only ground upon which this proceeding could be sustained, as within the jurisdiction of a court of the United States, was, that an information by a law officer of the government in his own name as such officer, but asserting rights of the United States, is a controversy to which the United States is a party within the meaning of those words in the constitution; for it was only because the United States was a party to the controversy that the jurisdiction attached. It would have been in conformity with what this decision declares to be the correct practice, if this information, and all proceedings which may ensue thereon, were to be in the name of the United States; but it is also in conformity with it to say, that though in the name of the attorney-general, for the United States, the United States will thereby be made a party to this controversy, provided what is done is sufficient to constitute any one a party to it. It remains to inquire whether the rights and privileges claimed by the attorney-general in behalf of the United States, if conceded, will make them a party to this controversy.

It seems to me somewhat difficult to reason about so plain a proposition. The attorney-general has already filed an information, alleging the interest of the United States, and showing what it is and how it arises. If an order is made thereon, allowing him to appear and support those allegations, the United States will appear on the record asserting their interest in this controversy. They will so appear, that they may enjoy the rights of a party to be heard by proper allegations and proofs, and by arguments at the bar. The process of the court must be accorded to them to obtain their proofs, in those modes and under those sanctions appropriated exclusively to the taking of evidence to be used in judicial

controversies. They are to be at liberty to oppose the pretensions of the other parties, and to assert and maintain their own, in a regular course of judicature; and they, in common with the others, are to be bound by the decree, which is to be the product of their allegations, proofs, and arguments, as well as of those of the two States of Florida and Georgia.

If all this does not make the United States a party to this controversy, it would be difficult for me to show that it has any parties.

Under our system of jurisprudence, what constitutes a person a party to the record? Is it not sufficient, if it appears by the record that he had a direct interest in the subject-matter of the suit; that he placed before the court in his own name, and not in the name of another, by some appropriate allegations, his claim or defense; that he introduced legal evidence in support of that
*502 claim or defense, which was heard by the court; that he * was heard by his counsel; that his rights, and what he presented to the court in support of them, were taken into consideration by the court in making a decision; and that these rights were intended to be bound, and in point of law are bound, by the decree? All this must appear from this record, if the United States be allowed to do what has been prayed for.

The attorney-general, in his very learned and able argument, has referred the court not only to the practice of some of the courts of England, but to the Roman law, and to the modern civil law of the continent of Europe, concerning intervention. This practice differs, in details, in the different countries. But so far as I have been able to examine, a third person who comes in after the institution of a suit, to assert a right of his own involved in the controversy, is considered and expressly denominated a party. The definition given in the Code of Practice of Louisiana, which is substantially borrowed from the French Code of Procedure, is: "An intervention, or interpleader, is a demand by which a third person requires to be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff; or it may be lawful for him, where his interest requires it, to oppose both." See also Merlin, Rep. vol. 16, and Recueil, voc. Intervention, Dalloy Dic. s. vocc.

The English law is equally clear. When the attorney-general is brought into a suit between third persons as the representative of the crown, and to protect its rights, though possessed of some privileges which do not belong to private persons, he is not only called a party, but he is treated as one. He is attended with a copy of the bill, and if he does not appear it is considered as a *nihil dicit;* and if he does appear and fails to answer, the bill is taken *pro confesso* as against the crown. 1 Dan. Ch. Pr. 169, 170, 531, 548.

Indeed, I am not aware of any case, either in equity or admiralty, or at law, under particular statutes, in which a third person who intervenes, is not considered and called a party. The ground upon which a decree *in rem* is held to bind all persons, is, that every one having an interest has a right to make himself a party to the cause, and that the seizure or arrest of the thing gives notice to all concerned, of the pendency of the proceedings, and thus enables them to become parties. In Rose *v.* Himely, 4 Cranch, 277, Chief Justice Marshall states this familiar rule: "Those on board a vessel are supposed to represent all who are

interested in it; and if placed in a situation which enables them to take
*503 notice of any proceedings against a vessel and cargo, * and enables them to assert the rights of the interested, the cause is considered as properly heard, and all concerned are parties to it."

And so in equity. Those who come in, even before the master, are, as Lord Redesdale says, (Mit. Pl. 178, 179,) considered parties to the cause in the subsequent proceedings.

With great respect for my brethren, I cannot agree that the reasons advanced by them why the United States will not be a party to the record are sufficient. Those reasons I understand to be, that no decree will be made against the United States, and that the attorney-general will not be allowed to interfere in any way with the pleadings, or proofs, of either the State of Florida or Georgia. As to the first of these reasons, it is certainly true, that no decree will be made against the United States, in form, or by name; but, if I understand the opinion of the majority of my brethren, they consider as I do, that substance and not form, is to be looked to in this case; and that the only inducement for allowing the United States to be heard is, that, from the nature of the controversy, all the world must necessarily be precluded by the decree from disputing the correctness of the line of boundary fixed by it. Whether the United States shall or shall not be named in the decree, would seem, therefore, to be formal rather than substantial, since their rights and duties will be the same, whether named or not. In either case, the decree will conclusively operate thereon.

And as to the other reason, that the attorney-general is not to be allowed to interfere with the pleadings or evidence of the States of Florida or Georgia, I must say, with deference for the better opinion of my brethren, that it seems to me to be a restriction which, while it still leaves the United States a party to the suit, deprives them of some of the rights of a party, and to that extent fails to carry out the very principle which requires them to be heard at all.

The right to have this case stated by Florida in the bill, so as to present it in its entire substance, is a substantial and important right of the United States. If the case is defectively or untruly stated there, the decree must be affected thereby, for Georgia has the right to insist that the decree shall conform to the bill. An explicit and full answer to the bill is also material to the United States, that they may know what is to be relied on, and what proofs and arguments are necessary to be adduced. The power to cross-examine witnesses, and to except to proofs when offered, has been deemed essential to the administration of justice. I would respectfully ask, upon what principle known to our juris-
prudence, are the United States to be deprived of these rights, if they are
*504 admitted at all to contest the claims of Georgia? * If both Florida and Georgia may cross-examine the witnesses of the United States, and except to their proofs, what intrinsic propriety or judicial reason can there be, why the latter may not cross-examine the witnesses and except to the proofs of the former?

With submission to a majority of my brethren, I confess it seems to me that to deprive a party of some rights which, under all systems of law known to us, are deemed essential, while other rights are allowed to him which can be conceded only to a party to the controversy, proves the embarrassment which was felt in carrying out the idea of making him a party, but does not overcome the

difficulty or even avoid it. It appears to me to declare, in effect, justice requires that you should be admitted as a party on this record; but, in order to make some distinction between yourself and other parties, you shall not enjoy all the rights of a party; and the particular rights which you are not to enjoy are, the power of excepting to the pleadings and proofs of the other parties.

This is not satisfactory to my mind. Whether I consider only the substantial relations of the United States to the controversy, or the analogous provisions of positive or customary law in our own and other countries, I cannot avoid the conclusion that if they are admitted upon this record to assert their rights—to show what they are, and how they are involved in this controversy; to maintain them, in the regular course of judicature, by allegation, proof, and argument, against the State of Georgia; to have the process of the court to enable them to do so; to profit by the decree if favorable, to lose by it if adverse—they are a party to this controversy, within the meaning of the constitution of the United States. And this raises the question, which in my opinion is a very grave one, whether the constitution permits the United States to become a party to a controversy between two states, in this court?

The judicial power of the United States extends, among other things, to controversies to which the United States shall be a party—to controversies between two or more States—between a State and citizens of other States or of foreign states, where the State commences the suit, and between a State and foreign states.

In distributing this jurisdiction, the constitution has provided that, in all cases in which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

*505 I am not aware that any doubt has ever been entertained by * any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.

There was a case of the United States *v.* Yale Todd, commenced in this court in 1794, which is not reported, but it is stated from the record, by Mr. Chief Justice Taney, in a note to the case of the *United States* v. *Ferreira,* 13 How. 52. Of this case the note says:—

"The case of Yale Todd was docketed by consent in the supreme court, and the court appears to have been of opinion that the act of congress of 1793, directing the secretary of war and the attorney-general to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of congress to give original jurisdiction to the supreme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is

confined to the cases specified in the constitution, and that congress cannot enlarge it. In all other cases its power must be appellate."

The decision of this court, in Marbury *v.* Madison, 1 Cranch, 137, settled this construction of the constitution; and, as stated in this note, no one who has examined the subject now questions it.

We have, then, two rules given by the constitution. The one, that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may
*506 have its just and full effect. This is * attended with no real difficulty.

When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

And when it says: "in all cases in which a State shall be a party, the supreme court shall have original jurisdiction," it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the constitution pledges the power of the nation to guarantee to every State a republican form of government; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts forms no exception to the general proposition, that the constitution confers on the United States powers to govern the people, and not the States.

There is, therefore, nothing in the general plan of the constitution, or in the nature and objects of the powers it confers, or in the relations between the general and State governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several

States. On the contrary, the agency of courts to compel the States to obey laws of the Union, or to concede to the United States its rights or claims, would naturally be deemed both superfluous and impolitic; superfluous, because the States can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are supreme, and in the courts of the United States, which have jurisdiction to enforce all laws of the
*507 United States; and * impolitic, because calculated to provoke irritation and resistance, and to excite jealousy and alarm.

It must be remembered, also, that a State can be sued only by its own consent. This consent has been given in the constitution; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a State has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. The State of Georgia has consented to be sued by one or more States, or by foreign states, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign state, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly, there is no power existing in this government to enlarge that consent so as to embrace in it any thing to which it does not, by its terms, extend.

I cannot agree that because the State of Georgia consented to be sued by the State of Florida, Georgia thereby consented to the introduction into the controversy of any party whose rights were so involved in the controversy that the court is bound, upon principles of natural justice, to have that party before the court, in order to make a decree.

In the first place, if it be conceded that a third party, not capable of suing a State, or being sued by one, is a necessary party to a controversy between two States, and that the court cannot make a decree without the presence of that party, it would seem to me to be the legitimate inference, that in such a case the States had not consented to be sued. Having consented to be sued, in controversies having certain described parties, it would seem that a controversy which could not be carried on by them was not one to which the consent applies.

So far as I am aware, the other grants of judicial power by the constitution, which depend on the character of the parties, have been so construed. Has it ever been supposed that into a suit between citizens of different States a third party not competent to sue or be sued, could come or be brought, because he was a necessary party, without whose presence a decree could not be made? Has the doctrine ever been advanced, that when the constitution gave jurisdiction over suits between citizens of different States, it thereby, by implication, authorized that jurisdiction to be extended so as to embrace every person whose rights were so involved in the controversy that the principles of natural justice required him to be heard?

Take the case of a suit between a citizen of Florida and a citizen of
*508 Georgia, in the course of which it appears that an * inhabitant of this District, who is not competent to sue or capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting that interest; has it ever been supposed that there was any implied power granted by the constitution and the 11th section

of the judiciary act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion. The forty-seventh rule for the equity practice of the circuit courts provides, that if persons who might otherwise be deemed necessary or proper parties to the suit cannot be made so, because their joinder would oust the jurisdiction of the court, as to the parties before the court, the court may, in its discretion, proceed in the cause without making such person parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. This certainly assumes that there is no implied power, arising out of the necessity of the case, to make them parties, or to bring them into the cause so as to hear and bind them without making them parties. The court is to distribute all the justice it can between the parties over whom it has jurisdiction; but if it can do nothing without the presence of a necessary party, the remedy is not to bring him in, or allow him to come in, but to refuse to act, and leave the parties to terminate their dispute by other means. This is declared by this court in Hagan *v.* Walker, 14 How. 36, and the earlier cases lead to the same conclusion. Russell *v.* Clarke's Ex'rs, 7 Cr. 98; Cameron *v.* Roberts, 3 Wheat. 591; Wormley *v.* Wormley, 8 Ib. 451; Carneal *v.* Banks, 10 Ib. 188; West *v.* Randall, 2 Mason, 195, 196; Shields et al. *v.* Barrow, ante, p. 130, of the present term.

It is true there is a class of cases in which this court has decided that when the jurisdiction of the circuit court, by reason of the character of the parties, has once attached, it is not devested by one of the parties losing the character which entitled him to sue, or subjected him to be sued in the circuit court, or by his death and administration being granted to a citizen who would not have been competent to sue; and further, that when the judgment operated *in rem,* as in a suit in ejectment, no change of the property, *pendente lite,* could prevent the circuit court from exercising its jurisdiction over its own execution. The cases of Morgan's Heirs *v.* Morgan, 2 Wheat. 297; Mollan *v.* Torrance, 9 Ib. 537, are of the first class. It was there held that a change of domicile did not defeat the jurisdiction which had once attached. In the case of Clarke *v.* Mathewson, 12 Pet., 164, it was held that a bill of revivor was but a continuation of the original suit, and that the jurisdiction having once attached was complete, and
*509 continued to enable the court to * adjudicate on that subject-matter. In Dun *v.* Clarke, 8 Pet. 1, it was held that the circuit court had jurisdiction of a bill to enjoin the levy of an execution on a judgment in ejectment, though the land had been devised so that all parties were citizens of the same State.

This was upon the ground that the devisee of the land was to be deemed the mere representative of the plaintiff in the judgment, and that as to him the bill was not an original suit, but a proceeding on the equity side of the court to enable the court to control its own execution; and according to the case of Harris *v.* Hardeman, 14 How. 334, the same thing might have been done upon motion on the law side of the court. But the court refused to take jurisdiction over the other parties to the bill who had an interest in the land, or to decide the merits of the controversy, and confined itself to staying the execution of the judgment until the merits could be investigated in a suit in a state court.

It will be seen, I think, that none of these cases rest at all on the ground that there is jurisdiction, by implication, over a third party whose rights are such

as to make his presence in the cause necessary. But if they did, they would fall far short of proving that such an implication can be made in this case. The constitution is merely silent concerning the introduction of a third person, not competent to sue or be sued in the courts of the Union, into a suit in the circuit courts; but it is not silent concerning controversies to which the United States is a party. It declares, in effect, that over such controversies this court shall not have original jurisdiction; for it makes its jurisdiction over such controversies appellate, and this, as has been long settled, excludes all original jurisdiction over such controversies, and even prevents congress from conferring it. Marbury *v.* Madison, 1 Cranch 137. To say that there is an implication that when the United States is a necessary party to an original suit in this court, they can become a party here, would be, in my opinion, not only an extension of the original jurisdiction of this court to a case not described by the constitution as within it, but to a party as to whom we are expressly forbidden to take such jurisdiction.

Nor do I find in the nature and circumstances of this case any such necessity for making the United States a party, as would lay a foundation for the presumption that it must be competent for the court, and consistent with the constitution and laws, to allow it to be done. This is not a broad question, whether in the exercise of the original jurisdiction of this court we are obliged to exclude all third parties, though they may have the most important rights and interests necessarily involved in the suit. I apprehend no such question arises here.

*510 * I do not doubt that in an original suit in equity here, between two States, or between a State and a foreign state, or between a State as complainant and individuals, or in a suit affecting ambassadors, other public ministers or consuls, any necessary party may be brought in who is competent to be sued by the plaintiff, or to sue the defendant in that suit in this court. Thus, a State may sue here other States, foreign states, all citizens of other States and of foreign states, and this I believe includes every possible party, except its own citizens and inhabitants of this District, and of the territories, and the United States. Setting aside residents of this District and of the territories, who cannot be deemed of great moment in this particular matter, and citizens of the State bringing the suit, whose rights the constitution evidently considers need no protection from this government, the practical effect of the doctrine I maintain will be found to be confined to the United States. They cannot be made a party to such a suit; and, in my judgment, it is in accordance with the whole plan of the government, as well as with the particular provisions of the constitution concerning the judicial power, that they should not be able to interpose and assume an adverse position to a State, in a judicial controversy in this court. Besides, I do not find in this case any real necessity to make the United States a party, according to the principles of equity law. A court of equity generally requires all persons who have an interest in a suit to be made parties. But it is a familiar rule, that when it is impracticable to bring before the court all interested, it is enough to make such parties as have a common interest with those who are absent. In such a case, the parties who are present represent the rights of those who are absent, and the court proceeds to make its decree, binding the rights of the absent parties, with the same confidence that justice is done as if they were before the court. Story's Eq. Pl. 97, 112.

Now, what is this case? The interest of Florida and that of the United States are identical. That interest is, to have the boundary line fixed as far to the northward as the proofs will allow. It is true, that what Florida seeks is the protection of its rightful jurisdiction as a sovereign State; and what the United States desire is the protection of its title as a landholder, and as the grantor of lands now held by their grantees. But both the political jurisdiction of Florida, and the title of the United States to land acquired from Spain, being coextensive with the territory of Florida, these two parties have a common interest in the subject-matter of this suit; and Florida is, in the contemplation of a court of equity, competent to represent the interest of the United States, as an owner of land.

*511 * This would certainly be true in the case of individual parties, and in my opinion the same rule applies with still greater force to these parties. Florida is a sovereign State, whose suit must be conducted according to the will of its legislature. There is no room for any suspicion of any unworthy motives or conduct in its management. It is a high duty of that State, which it owes to itself, and which will doubtless be discharged to vindicate its jurisdictional rights, and make good its claims to all the territory which comes within its true limits. Though the question is merely where a line should be run, that line carries with it the sovereignty and territorial jurisdiction of States .

On the other hand, the United States is a landholder, whose title may be affected by running the line in one place rather than another. And so will the titles of hundreds of other landholders in this territory, whose interest is precisely the same as that of the United States, in kind, though not in amount. To say that it is necessary for the purposes of justice, that the United States, as the proprietor of lands, should be admitted into this suit to take care lest the State of Florida should omit something by way of pleading or evidence, seems to me to be yielding to an imaginary necessity only.

It is not alleged that the United States has any interest in this controversy except as an owner or grantor of land. Unquestionably there are political considerations, affecting the federal relations of the States, and connected with the extent of their territory, in reference to which the United States has a direct and important interest. This is not only obvious in itself, but is recognized by the constitution in various ways, and, amongst others, by the prohibition of the States to make any compact without the consent of the United States. But the object of this suit is not to change the limits or territory of States, but to ascertain their true and actual boundary; and in this question the United States has no interest, except that justice should be done; an interest which is not of a character to warrant the government in interposing in this case to assist in securing it, any more than in any other case pending in this court. It is suggested that the counsel for the two States may make agreements as to evidence, and other matters respecting the suit, and that the United States ought to be a party, in order to supervise such; but it seems to me that if this were a sufficient reason for making the United States a party in this case, it would apply to all cases between two States; for in all cases such arrangements are as likely to be made as in this one. But if such agreements of counsel, respecting the mode of conducting a suit between two States, could be deemed compacts between those States, within

*512 the restraining clause of the 10th * section of the first article of the con-

stitution, congress, and not the attorney-general, or this court, must sanction them; and there does not seem to be any satisfactory reason why that officer should be connected with the subject. Any agreement fixing the line of boundary, made by the two States and not sanctioned by congress, would certainly not be executed by this court, which is to decree on the existing rights of the parties, and not upon new rights created by a compact, which is not valid without the assent of congress.

But, if the objection to the jurisdiction could be overcome, I should still be of opinion that the attorney-general has not authority to make the United States a party to a suit in this court. That officer possesses no power derived from usage or implied from the name of his office. His powers are only coextensive with his duty; and that is defined by law to be, "to prosecute and conduct all suits in the supreme court in which the United States shall be concerned." 1 Stats. at Large, 93. It belongs to congress alone to decide in what cases the United States may be made a party in the courts, and to designate the officers by whom they may be made a party. This power congress has exercised. They have conferred upon the district attorneys power to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned. 1 Stats. at Large, 92. By the act of May 29, 1830, § 5, (4 Stats. at Large, 415,) the solicitor of the treasury is empowered to instruct the district attorneys in all matters and proceedings appertaining to suits in which the United States are a party, or interested; and by the 10th section of the same act, the attorney-general is to advise with and direct the solicitor. But no authority is conferred by any law, upon any officer, to make the United States a party to any suit, except as a plaintiff or prosecutor. If the United States be interested in a suit against an individual, and he thinks fit to allow the law officer of the United States to prosecute or defend in his name, I know of no objection to it, and it is very often done. It may be suggested, that as the line of boundary will be fixed by the final decree in this case, and as the rights of the United States will thereby be concluded, it can do them no injury, but may be beneficial to them, to be a party to this cause. If this be so, and the court has jurisdiction, it may afford sufficient reason why congress, in its discretion, should authorize an appearance by the attorney-general in behalf of the United States; but it does not enlarge the power of that officer, or enable him to do what, in my opinion, no law has conferred on him power to do,—to make the United States a party to an original suit in this court.

*513 * I am authorized to say that Mr. Justice McLean concurs in this opinion.

Mr. Justice CAMPBELL dissenting.

I dissent from the opinion of the court. The attorney-general suggests to the court that the State of Florida has filed here an original bill against the State of Georgia, for a settlement of the boundary between the States. He represents that the line claimed by Florida is that which the United States have recognized in the surveys, sales, and other operations of the land-office, and that the line of Georgia diminishes the domain of the United States in Florida twelve hundred thousand acres. "Whereupon, and in consideration of the interest and concern of the United States," he moves for leave "to appear in said cause, and be heard

in behalf of the United States, in such time and form as the court will order." The condition of the cause, in relation to which the motion is made, is, that a bill and answer have been filed, but no issue exists, and none of the ulterior stages in the course of the cause attained; nor has there been any motion to the court requiring an examination of the record; and so the motion, as understood from its terms, is certainly premature. But the words, "to appear in said cause and be heard in behalf of the United States," very indifferently explain the significance of the motion. The application is, that the attorney-general may "intervene," "not as a technical party; not as joining with the one or other party; not in subordination to the mode of conducting the complaint or defense adopted by the one State or the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact, by either party, or both; but to coöperate with or to oppose both or either, and to bring forth all the points of the case, according to his own judgment, whether as to the law or fact."

Though the pleadings show that the interests of the State of Florida and of the United States unite to maintain the same line, the attorney-general declines to adopt her suit, lest the condition of the United States might become "precarious," "depending on the discretion of Florida." Nor will the attorney-general file a bill for the United States, nor agree that Florida may make them defendants to hers, for, "that the court is not empowered by the constitution to entertain an original suit" of the kind.

Nor is the motive for this intervention merely that the United States have a fiscal interest, for the attorney-general suggests that the constitution may be violated by agreements and compacts of States, "entered of record," *514 thereby altering the limits * of the States and the structure of the Union, "to the direct prejudice of the rights, interests, and laws of the United States." These suggestions of possible injustice arising from collusive compacts "entered of record," may be used in any judicial controversy between States, and in this case no evidence of such appears of record; and if such suggestions are heeded, the attorney-general must be constantly an applicant for leave to appear, "not as a technical party," but to employ some oversight, superintendence, or censorship, in suits between States of the Union in this court; and surely, such a claim requires new modes of proceeding, and that now proposed is as peculiar as the claim. The United States appear, with the assertion of their exemption from suit in this court—that the original jurisdiction of the court does not embrace them as a party. Thus declaring independence of process, pleading, and decree, in an original suit in the court, they ask to assist or to assail, at their pleasure, suitors legally before it, and to mould the decree in their case by allegations, evidence, and arguments, introduced without, and perhaps against, their will.

The principle of common law and chancery procedure is, that suits are commenced, prosecuted, and defended by parties to the record in their own names; and the intervention of third persons, not parties, is unknown to the system; and we may affirm confidently, in a case like this, where the party is above and beyond the jurisdiction of the court, such a case is without a precedent. 2 Chitty's Pr. 343. The case of Pentland *v.* Quorrington, 3 My. and C. 249, was that of a trustee, with a full assignment, suing in the name of the assignor, under

his power of attorney, and obtaining a decree with notice to the defendant. The nominal plaintiff agreed to an order for delay, and the trustee petitioned for a discharge of the order, and that he might conduct the suit. Lord Cottenham said: "It is a perfectly new equity. The only suit in court is a suit between the defendant and the party (assignor) with whom the contract was made. The plaintiff (assignor) is a party to the arrangement, for effectuating which the present order has been made. Your case is against him, that whereas he has authorized you to carry on this suit in his name, he has entered into the arrangement in question without your concurrence. If I were to make such an order, I should be giving you the right of carrying on this suit against the defendant; I should be displacing the plaintiff on the record." He asked: "Is there any instance of such an interference on the part of the court as you now ask?" The eminent solicitor answered: "I admit that I have never seen a case like the present." So in Drever *v.* Manderley, 4 M. and C. 94, an order allowing
*515 a third person to control a suit where the subject * belonged to him by assignment, but to which he was not a party by any proceeding, was pronounced by the same chancellor "perfectly irregular." The court did not object to the right to the subject of the suit, but to the mode of enforcing the right, by the attempt to control the suit. It required the assignee to exhibit his right by bill, according to the practice of the court, in his own name.

Chief Justice Marshall, in describing the controversies to which the judicial power of the United States extends, says:—

"The words are of well understood and limited signification. It is a controversy between parties which had taken a shape for judicial decision." "To come within the description of a case in law and equity, a question must assume a legal form for forensic litigation and judicial decision. There must be parties come into court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit." 5 Wheat. Ap. 16, 17. The supposed cases of exception cited by the attorney-general only display the pervading extent of this principle. The instances quoted are rules under the interpleading act of Wm. IV.; landlords defending for tenants in ejectment, vouchees in warranty in real actions, bills of interpleader, and suits by representative parties, for or against themselves and others. The cases referred to in courts of common law arise, where a person having the primary right or obligation, is called as a party to the suit to defend that right or to fulfil the obligation; and Lord Coke speaks of the common law instance of a vouchee as "seeming strange" and depending upon "ancient," continual, and constant allowance," (2 Ins. 241;) and so, in interpleading suits, parties having an adverse interest are called in by process, as parties, to disengage a neutral who may have the subject of controversy and desires to relinquish it to the owner, when he shall be ascertained, and in representative cases the court acts upon the parties to the record, and determines the case made by them. In this case, the United States admit no representation on their behalf; nor will they undertake the suit of either, nor admit the jurisdiction of the court to treat them as a suitor or party; but contest the authority of the court, are ready to contest or strengthen the positions of either party, and thus they seek, by an anomalous Austrian intervention, to overlook and control the proceedings of the litigants to their own aggrandizement. I find no precedent in the direct and straightfor-

ward course of the common law, nor in the statutes altering it, for such a conduct. I will briefly examine the precedents to which we have been cited, in the codes of procedure of those tribunals which apply the jurisprudence of imperial
*516 or * papal Rome. The French code permits the interposition of third persons in existing suits. An intervenor may guard a present or future interest, or one certain, contingent, conditional, or collateral, whether pecuniary or personal, or held as a representative. But the inquiry is, how and under what circumstances? And the answer is by propounding his pretensions to the court as a suitor, inviting contest, alleging proofs, recognizing the jurisdiction of the court, and submitting to its decree. 4 Bioche Dic. de Pro. 590; Louisa. Code. Prac. § 324.

La Cañada, describing the Spanish system, says, there are necessarily two parties to every suit (*actor* and *reo*); and when a third litigant comes, he is called by that number (*tercero*); and because he can oppose either of the parties, or both, the word opposer is added (*tercero opositor*), and his act is called third opposition. If he comes to aid another party in the same right, he accepts the suit as he finds it, and acts conjointly; if his rights are independent, adverse, or paramount, his suit is treated as an original suit, and is conducted as ordinary suits.

The third opposer is technically a party to the cause, and really subject to the decree. La Cañada, Juicos Civiles, 393.

Nor do the admiralty or ecclesiastical codes afford any sanction to the motion. Their jurisdiction being largely *in rem,* they allow persons who have a present and certain claim to the *res,* to propound their interest, if the court has jurisdiction; and by the act the persons become parties to the suit, liable for costs, and entitled to appeal. The various codes, then, differ in the time and manner of calling parties before the court. The conditions of a suit at the common law, in general, are settled at its institution, and new and independent parties are not introduced in the subsequent stages. The courts of chancery are more liberal in reference to the time of making parties and in the extent of their amendments. But in both courts the plaintiff is the *dominus litis,* and third persons may not come in unless he amends the proceedings, or his bill is fitted for it, as being a representative bill. But in the civil, admiralty, and ecclesiastical courts, the power of third persons to propound their rights in the subject of dispute is not so dependent upon the will of the prior parties. But all the codes of procedure unite in this, that persons must come in according to a regular course of procedure, accepting the authority of the court, citing adverse parties to defend, and yielding to whatever decree it may pronounce. The more than imperial claim, in this instance, is for all the faculties of a suitor, without a submission to the obligations and restrictions of one. But it is supposed that precedents in the English chancery support a pretension of the attorney-
*517 general to intervene according to his motion. * An important class of the rights of the crown are represented there by the queen's attorney-general; but how? He is introduced upon the record as a "technical" party to the suit, and the crown is bound by the decree. When the right is adverse to the plaintiff, the attorney-general is made a party by prayer in the bill and the service of a copy. If he fails to appear, it is a *nil dicit;* and if he appears and will not answer, a decree *pro confesso* is taken. Danl. Ch. Pr. 175, 501, 548; Dick. 729; 1 Y. and J. 509.

And courts there exercise over the attorney-general the same authority which they exercise over every other suitor, and he would not be permitted more than any other suitor to prosecute any proceeding merely vexatious, or which had no legal object. The Queen *v.* Prosser, 11 Beav. 306.

The cases cited, of Penn *v.* Lord Baltimore, Hovenden *v.* Annesly, Attorney-General *v.* Galway, and the analogous cases of Dolder *v.* Bank of England, and Burgess *v.* Wheat, (Cas. temp. Hard. 332; 2 Sch. and Lef. 617; 1 Moll. 95; 10 Ves. 352; 1 Eden. Ch. 177,) are instances of the application of the rule that the court will require the crown to be made a party to the record, under the name of the attorney-general, and that he comes as an actual and obedient party, and not in any illusory and indeterminate form; so that, if the claim of the attorney-general to represent the United States in courts, to the extent claimed, is tenable, the manner of the intervention here is inadmissible.

But I do not admit that the attorney-general has any corporate or judicial character, or that he can be introduced upon the record, in his official name, as an actor or respondent in a suit. His duties are strictly professional duties, and his powers those of an attorney at law. Whatever he may do for the United States, a special attorney might be retained to do; nor can the United States appear in his name, nor by his agency, in cases where they may not be a party.

I have considered this motion upon the concessions of the argument, but the principle lying at the foundation of the case should not form the basis of a judgment merely on the strength of such concessions; and hence I proceed to its examination.

The judicial power of the United States extends to all cases in law and equity arising under the constitution and laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to controversies to which the United States shall be a party; to controversies between two or more States; and between a State or the citizens thereof and foreign states, citizens, and subjects.

*518 * "In all cases affecting ambassadors, &c., and those in which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned the supreme court shall have appellate jurisdiction only." It was not in the design of the constitution to alter or even to modify the existing relations of any of the sovereign parties named in this article, to legal jurisdictions, by enlarging their liableness to suit; but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit or were subject to, according to their preëxisting conditions. Thus, no suit can be commenced against the United States, foreign states or ambassadors, and public ministers; nor are they brought within the jurisdiction of the courts of the United States to any degree beyond that to which they were liable, without this constitutional clause. The construction which allows the exemption of these parties as sovereigns, or their representatives, to operate, sanctions, also, the title of the States to the same right, for they are mentioned in the same clause; and the jurisdiction conceded to this court, in reference to them, is expressed in similar or identical language.

I am aware, that at an early day in the existence of this court, a contrary opinion was expressed by a majority, upon a motion for an interlocutory order in

a suit against a State, and I propose to examine the principle established in the controversy, of which that opinion is a part.

While the constitution was under discussion, General Hamilton (Federalist, 81) said, "that it is in the nature of sovereignty not to be amenable to the suit of an individual without its consent," and contended, "that to ascribe to the federal courts, by mere implication, and in destruction of a preëxisting right of the state governments, a power which would involve such consequences, would be altogether forced and unwarrantable." So, Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry, in a careful exposition of the judiciary clause, calmed the Virginia convention by assuring it that "it is not in the power of individuals to call any State into court. The only operation the clause can have is, that if a State should wish to bring a suit against a citizen, it must be brought in a federal court." And the late Chief Justice Marshall supported him saying: "With respect to disputes between a State and citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think a State will be called at the bar of a federal court.

*519 It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable * States to recover claims of individuals residing in other States. I contend this construction is warranted by the words." Virginia Deb. 387, 405, 406.

When these assurances from the most accredited friends of the new government were disappointed, by the institution of suits in this court against several of the States, by individual plaintiffs, shortly after the adoption of the constitution, a strong sentiment of wrong was felt, and corresponding indignation expressed. This indignation was not occasioned by any apprehension of consequences to the States as debtors, but by the fact that they supposed their rights to be violated. The history will bear no other interpretation. In Chis[h]olm *v.* Georgia, that State instructed counsel to present to the court a written remonstrance and protestation against the exercise of jurisdiction, but not to argue the cause. The attorney-general opened the case of the plaintiff by saying: "He did not want the remonstrance of Georgia, to satisfy him that the motion for judgment was unpopular. Before that remonstrance was read, he had learned from the acts of another State that she too condemned it." The court awarded a writ of inquiry upon the default of the State, sustaining the jurisdiction upon arguments of the utility, justice, and safety of the delegation of the power, and of the diminution and abasement wrought upon the States by the constitution. Mr. Justice Wilson states the case "as one of uncommon magnitude." He says: "One of the parties is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether the State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others more important still; and may perhaps be ultimately resolved into one no less radical than this: Do the people of the United States form a nation?" It is not difficult to perceive the profound misconception of the relations of the States to the Union which dictated his judgment. The following year the legislature of the Commonwealth of Virginia adopted a resolution which contains a reply to the question: "Resolved unanimously, that a State cannot, under the constitution of the United States, be made a defendant at the suit of any individual or indi-

viduals; and that the decision of the supreme federal court, that a State may be placed in that situation, is incompatible with and dangerous to the sovereignty and independence of the individual States, as the same tends to a general consolidation of these confederated republics;" and instructed their senators and representatives "to unite their utmost and earliest exertions to obtain such amendments as will remove or explain any clause which can be construed to
*520 imply * or justify a decision that a State is compellable to answer in any suit by any individual or individuals in any court of the United States."

One month after, January, 1794, the senate was moved by Mr. Strong, of Massachusetts, to adopt the eleventh amendment to the constitution, declaring that the constitution should not be construed to authorize such suits. Various attempts were made in both branches of congress to limit the operation of the amendment, but without effect. It was accepted without the alteration of a letter, by a vote of 23 to 2 in the senate, and 81 to 9 in the house of representatives, and received the assent of the state legislatures. Georgia ratified the amendment as "an explanatory article," her legislature "concurring therewith, deeming the same to be the only just and true construction of the judicial power by which the rights and dignity of the several States can be effectively secured." Thus the supreme constitutional jurisdiction of the United States, the concurrent action of congress, and the state legislatures, expressing a consent nearly unanimous, corrected the opinion of the supreme court, and intercepted its final judgments in these cases, by declaring that the constitution should not be so construed as to allow them.

The reporter of the court closes the volume which contains the case of Chis[h]olm, by saying "the writ of inquiry was not sued out and executed; so that this cause and all other suits against States were swept at once from the records of the court by the amendment of the constitution." The course of argument which excluded the jurisdiction of such cases, applies with equal force to suits by foreign states against the States of the Union. And the considerations which forbid suits against the States by individuals, indicated with such clearness in the Federalist, form the basis of the luminous and masterly judgments in the English chancery, in the case of the Duke of Brunswick *v.* King of Hanover, 6 Beav. 1; 2 H. L. Ca. 1, where the delicacy, difficulty, and danger of the jurisdiction, and its want of practical value, are fully set forth, and the conclusion announced "that it is a general rule, in accordance with the laws of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the courts there." It is clear the constitution did not abrogate any law of nations, and the only question is whether the States consented to suits without any reciprocal right, or whether the existence of such a power in foreign states could possibly assist any objects of the confederacy. On the contrary, would not such a promiscuous grant jeopard its tranquillity and peace? The answer of Mr. Madison to the Virginia convention is positive and direct. "I do not
*521 * conceive," he says, "that any controversy can ever be decided in these courts, between an American and foreign state, without the consent of parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant with the law of nations." Virginia Deb. 391. To this consent, it may be that congress would be a necessary party.

The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit between

two or more States? The constitution does not mention such a case. There were before the federal convention propositions to extend the judicial powers to questions "which involve the national peace and harmony;" "to controversies between the United States and an individual State; and in the modified form, "to examine into and decide upon the claims of the United States and an individual State to territory." None were incorporated into the constitution, and the last was peremptorily rejected. The jurisdiction of this court over cases to which the United States and the States are respectively parties, is materially different—the one original, the other appellate only. There was no encouragement, nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the federal legislation naturally inspires a sentiment in favor of the federal authority. These operative causes of bias were known; and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat, that the enumeration of the parties in this article of the constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause authorizing suits between two or more States afford any contradiction to this conclusion.

The articles of confederation, by which they were then combined, allowed congress, as the occasion might arise, to appoint special tribunals "to which all disputes and differences now subsisting, or that might hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever," should be submitted.

Similar provisions for special and occasional tribunals, in matters of jurisdiction and boundary, formed a part of the plan of the constitution till near
*522 the close of the convention, when * they were stricken out, and the general jurisdiction over those as well as other controversies delegated to this court. My conclusion, after an examination of the clause, is, that it is only in controversies between the States that one of their number can be impleaded in this court without its explicit consent; and that this jurisdiction is special, as to the controversy and the parties, embracing none except those between the States of the Union; that the court has no original jurisdiction of the United States, and none of a controversy between them and an individual State; and consequently, that they have no title to appear as a party to the record, nor in any undefined and uncertain relation to it.

And now the question arises, whether the United States can or ought to be concluded as to their property, without a privilege to appear and be heard, by a judgment of the court, upon a question of boundary submitted by two or more of the States, for its adjudication?

Without assigning any effect to the judgment that may be rendered, or anticipating whether the rights of the United States may be reserved, I will assume that the United States will be estopped by the judgment, and that no reservation of their proprietary rights can be made; and consider whether, under such circumstances, there is injustice. The government of Florida involve in this suit

her highest claims—those of sovereignty and jurisdiction—and fulfil their chief political obligations in its prosecution. If individual claims are affected by the decree in such a suit, it is because they are so incorporated in the rights of their sovereign as to have no separate or independent existence. She is the representative of all the proprietary rights and interests of her people in their contest with another sovereign. The United States, in resigning their sovereignty over the territory of Florida to the people, and by recognizing their government, relinquished their authority over this controversy, and consented that their proprietary claims to the waste and unappropriated lands should abide the issue to which the State, in her wisdom and fidelity, should attain. This sovereign control of Florida was modified upon her accession to the Union. After this, if the controversy was settled by negotiation and compact, the consent of congress was necessary to its binding operation, as in other cases of compact. If it was settled contradictorily, then this tribunal was appointed to make the determination.

Nor do I perceive that the executive department has any title to disturb the parties or the court, with the expression of anxieties or apprehensions that this court will be lured to perform what congress alone may do, or that *523 these constitutional conditions * will not be honorably fulfilled. The existence of this federal government, in its whole extent, is a testimonial to the magnanimous and disinterested polity of the States of the Union; nor is the concession, which submits to a tribunal of justice the peaceful and rational adjustment of the controversies between sovereign States, the least weighty of the proofs of those dispositions. It seems to me, that it is the duty of this court to come to the exercise of the jurisdiction the States have conferred, in the same spirit; to exercise it according to the letter of their submission; to exclude from it suspicion, jealousies, interventions from any authority, but to meet the parties to the controversy with confidence.

Dissenting from every part of the order, I have filed the reasons for the dissent.

Order.

Ordered, that the attorney-general have leave to adduce evidence, either written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States.

After the motion of the *Attorney-General* for leave to intervene in this suit had been decided, *Mr. Westcott* and *Mr. Johnson,* on behalf of the State of Florida, moved for leave to take out commissions to examine witnesses in the case, and for sundry orders to expedite the case and prepare it for trial.

Among the orders moved for was the following:—

"That (the consent of the State of Florida being hereby given thereto) the attorney-general of the United States may, in behalf of the United States, use the name of said complainant whenever he may deem it advisable that the United States should sue out any commission, to take any testimony or procure any proofs in said cause; he giving notice thereof to the solicitors or counsel for said parties, as aforesaid."

This part of the motion was opposed by the counsel for the State of Georgia; and, in behalf of that State, a motion was made to appoint a commissioner and

surveyor to survey the premises in dispute, and take testimony and report to the court; the motion stating particularly how the duty was to be performed. This motion was opposed by the counsel for the State of Florida.

The questions were argued by *Mr. Westcott,* for the complainant, and *Mr. Badger,* for the defendant.

Mr. Chief Justice TANEY delivered the opinion of the court.

The court have considered the above motions.

*524 * The motion to authorize the attorney-general of the United States to take testimony, and to conduct the proceedings on behalf of Florida, with the assent of the State, is refused. Each State must conduct its proceedings for itself. Whatever the attorney-general does in the case must be for the United States, and in the name of the United States, and with reference to their interest or duty in this controversy.

The motion on behalf of the State of Georgia, to appoint one or more persons to make the necessary surveys and to report their opinion to the court, is also overruled. Each party is at liberty to cause surveys to be made, and maps prepared and filed, by such person as the State may select, or if they can agree, they may jointly appoint one. And these surveys and maps, and the proofs applicable to them, will be examined and considered by the court at the hearing, with the other testimony. But the court do not deem it advisable to appoint one or more persons to make these surveys and examinations, as officers of the court; and think the case will be better brought before them by leaving each State to act for itself.

The court, therefore, overrule the motions; and, for the purpose of preparing the case for hearing, make the following order:—

Final Order.

On consideration of the several motions filed yesterday by the complainant's counsel, and of the arguments of counsel thereupon had, as well in support of as against the same, it is ordered by the court that the said motions be and they are hereby overruled. And it is further now here ordered by the court, that the said parties in said cause be allowed until the first Monday of December, 1855, to obtain, take, and file the testimony and proofs, by said parties respectively to be adduced and given in evidence, on the hearing of said cause; and that, to enable said parties respectively so to do, commissions, in the usual form, be issued by the clerk, to examine witnesses, upon application of either party, accompanied by interrogatories, a copy whereof has been served upon the adverse party, or its solicitor or counsel, twenty days previous to such application, in order that cross-interrogatories may be filed within said twenty days by such adverse party; and that the commissioner or commissioners in each instance, if not agreed upon by the counsel of the respective parties, be named by the chief justice or one of the associate justices of this court; and that, forthwith, on the return of any commission executed, the clerk do open and file the same, and cause the same to be printed for the use of said parties.

*525 * And also, that any exceptions to testimony may be taken at the final hearing; and, if exceptions be then taken to the competency of testimony, which the opposite party can remove by further proof, the court will reserve the decision, and give time to the party to produce it.

And also, that said cause be set for final hearing on the bill, answer, replication, exhibits, testimony, and proofs, so adduced, filed, and admitted, on the second Monday of January, 1856, unless cause be then shown to the court for the continuance thereof.

State of Alabama, Complainant, v. State of Georgia.

Supreme Court of the United States, 1859.

[23 *Howard,* 505.]

The boundary line between the States of Georgia and Alabama depends upon the construction of the following words of the contract of cession between the United States and Georgia, describing the boundary of the latter, viz.: "West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof."

It is the opinion of this court that the language implies that there is ownership of soil and jurisdiction in Georgia, in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme drought of the summer or autumn.

The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the above-recited paragraph.

*506 *By the contract of cession, the navigation of the river is free to both parties.

See the case of Howard *v.* Ingersoll, 13 Howard, 381, and the correction of its syllabus in the errata in 14 Howard in this, that "the boundary line runs along the top of the high western bank," instead of "the boundary line runs up the river, on and along its western bank, and the jurisdiction of Georgia in the soil extends over to the line which is washed by the water wherever it covers the bed of the river within its banks."

This was a case of original jurisdiction in the Supreme Court, under that article in the Constitution which confers jurisdiction over controversies between two or more States.

The State of Alabama filed her bill in this court at December term, 1855. After stating the compact of 1802 between the United States and Georgia, the bill stated the claim of Alabama as follows:

The complainant further states, that this line can only be ascertained with

certainty and accuracy by a just and proper construction of the agreement and cession aforesaid, made and entered into as aforesaid by and between the State of Georgia and the said United States, and that, by a just and proper construction thereof, the said line commences at a point where the 31st degree of north latitude crosses the Chattahoochee river, and on the western bank of said river, on that part or portion of the said bank that reaches to or touches the water at ordinary or common low water, and runs up said river and along the western bank thereof, and on said portion of said bank that touches the water at its ordinary or common height, until said line reaches the point on said river from whence it leaves the same in a straight direction to Nickajack—in other words, that said line, so far as it runs on the bank of the Chattahoochee river, runs upon the western bank at the usual or common low-water mark. And as evidence that the line as above described is the true and correct line according to the true intent and meaning of said agreement and cession, your complainant states, that the banks of said river over and upon which said line runs, though at some few places high and steep, over which the water never passes, yet said banks are mostly low and flat, so that when the river is high, or when there is a

*507 usual or common freshet, the water of said * river spreads over the land at some places as much as a half mile, at some places less, and other places more than a half mile west from the common low-water mark. And your complainant cannot and never has believed that it was the intention, either of the State of Georgia or of the United States, that said line was to be placed on what may be termed the high-water mark of said river, at the time they entered into the agreement and cession aforesaid, not only on account of the uncertainty in ascertaining and locating the same, but also for the further reason, that at some places on said river the jurisdiction of the State of Georgia would pass far west of the river at its ordinary height, whilst at other places, where the banks or bluffs are high and steep, it would pass but little or none at all beyond the line marked by the ordinary or common stage of the water.

Influenced by these reasons, as well as by the consideration that the line of ordinary low-water mark is readily and easily ascertained, the State of Alabama has ever claimed that said line runs upon the bank where the water touches the same when the river is at its ordinary or common height—that is, that said line runs on the western bank of said river at usual or common low-water mark, and not on the bank at high-water mark. And your complainant has ever claimed and exercised jurisdiction all along and upon said bank to low-water mark, as above described, until the line reaches that point on the river from whence it starts directly to Nickaja[c]k.

The State of Alabama then called upon the State of Georgia to answer the following questions:

1. Whether or not the said defendant does not claim all the lands on the western bank of the Chattahoochee river, north of the 31st degree of north latitude, up to the point or place where the line that separates the State of Alabama from the State of Georgia leaves the bank of said river in a straight direction for Nickajack, and whether she does not claim and assert a right to exercise jurisdiction and authority over all of said land on the western side of the Chattahoochee river up to high-water mark?

*508 * 2. Whether the defendant does not claim that the jurisdiction and soil all along the bank of said river, up to high-water mark, belong exclusively

to her, the said State of Georgia, and that the line separating the State of Alabama from the State of Georgia is located on the western bank of said river, at high-water mark?

3. Has not the complainant described correctly the character of the bank of said river, and particularly that portion of the bank commencing at the 31st degree of north latitude, and extending sixty or seventy miles above?

4. Does not the water, at many places on the western side of said river, and south of the point where said line leaves the same for Nickajack, pass far beyond and west of the ordinary low-water mark?

5. Are not the banks of said river, at many places north of the 31st degree of north latitude, low and flat? and does not the water of said river, during the usual freshets, pass over the adjoining land, at some places as much as a half mile, at some places less, and at other places more than a half mile west of the ordinary low-water mark of said river?

6. Has not the complainant correctly set forth the first section of the articles of agreement and cession between the United States and the State of Georgia (and described in this bill) so far as is necessary to ascertain the boundary line between the States of Alabama and Georgia, and has not the complainant correctly described the titles by which the United States acquired the Alabama territory? And, if not, in what particular is the description defective, and what part of the articles of agreement and cession not set forth is material in ascertaining said line?

At December term, 1858, the State of Georgia answered, after reserving to herself all manner of advantage to be derived from demurrer or plea to the bill. The facts of the case, as stated by Alabama, were admitted, as was the conclusion that the eastern boundary of Alabama was the western boundary of Georgia, wherever that might be. This Georgia not only admitted for Alabama, but affirmed for herself.

*509 * The claim of Georgia and answer to the interrogatories propounded were as follows:

So far as this line runs along the western bank of the Chattahoochee river, Georgia denies that it runs along the usual or common low-water mark, but, on the contrary, she contends that it runs along the western bank at high-water mark, using high-water mark in the sense of the highest line of the river's bed; or, in other words, the highest line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth.

In answer to the specific questions which are propounded by the bill, the State of Georgia says, that so far as the Chattahoochee river is the dividing line between her and the State of Alabama, she does claim all the lands, and a right to exercise jurisdiction over all the lands on the western bank of said river up to high-water mark, using high-water mark in the sense just above explained. She says, in answer to the second question, that she does claim that the jurisdiction and soil all along the western bank of said river, up to high-water mark, belong exclusively to her, and that the line separating the State of Alabama from the State of Georgia is located on the western bank of said river, at high-water mark, using the term high-water mark in the sense before explained. To the third question, the State of Georgia says, that while she regards the description of the banks of the river given in the bill as being too

highly drawn, yet she admits that it is more applicable to the southern part of the bank than to that part of it sixty or seventy miles above the 31st degree of north latitude; and she admits that in some places the banks are flat, but she says that in other places, especially on the upper and longer portion of the river, the banks are generally steep and well defined—so much so as to be familiarly known as "the bluffs of the Chattahoochee." To the fourth and fifth questions, Georgia says, that the banks of said river, at a number of places along the dividing line between the two States, are low and flat; and it is true that in freshets the water passes west of the low-water mark, as far, perhaps, as half a mile in some places, and, in a few places, perhaps even farther. To
*510 * the sixth and last specific question, Georgia answers, that the first section of the articles of cession from Georgia to the United States is set forth in the bill with substantial correctness, so far as this controversy can be affected by it, and that the exact words of that section are as before stated in this answer. Also, she admits that section to be the only one material to this issue. She admits that the title of the United States to the territory of Alabama was acquired from Georgia by the means described in the bill, but she does not admit the intimation that the United States had acquired a previous title from the State of South Carolina, nor can she perceive the relevancy of such an intimation to the present issue.

The evidence in the case was all documentary. There was filed for the complainant an argument by *Mr. Dargan* and one by *Mr. Phillips,* who also argued the case orally. It was also argued orally by *Mr. McDonald* and *Mr. Gibson.* These arguments partook rather of the character of a diplomatic negotiation than a forensic dispute, and the reporter declines to attempt to abbreviate them in a law book.

Mr. Justice WAYNE delivered the opinion of the court.

This case involves a question of boundary between the States of Alabama and Georgia.

Alabama claims that its boundary commences on the west side of the Chattahoochee river at a point where it enters the State of Florida; from thence up the river along the low-water mark, on the western side thereof, to the point on Miller's Bend, next above the place where Uchee creek empties into such river; thence in a line to Nickajack, on Tennessee river.

Georgia denies that the line intended by the cession of her western territory to the United States runs along the usual low-water mark of the perennial stream of the Chattahoochee river, but that the State of Georgia's boundary line is a line up the river, on and along its western bank, and that the ownership and jurisdiction of Georgia in the soil of the river extends over to the water-line of the fast western bank, which, with the eastern bank of the river, make the bed of the river.

*511 * The difference between the two States must be decided by the construction which this court shall give to the following words of the contract of cession: *"West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof."*

In making such construction, it is necessary to keep in mind that there was by the contract of cession a mutual relinquishment of claims by the contracting parties, the United States ceding to Georgia all its right, title, &c., to the territory lying east of that line, and Georgia ceding to the United States all its right and title to the territory west of it.

We believe that the boundary can be satisfactorily determined and run in this suit, from the pleadings of the parties, notwithstanding their difference as to the locality and direction of it on the Chattahoochee river.

Georgia is interrogated in certain particulars in the bill, which the complainant thinks will produce answers illustrative of the right of Alabama to the boundary which is claimed. Georgia answers them separately, having previously given a correct and literal copy of the contract. It is as follows: "The State of Georgia cedes to the United States all the right, title, and claim, which the said State has to the jurisdiction and soil of the lands situated within the boundaries of the United States south of the State of Tennessee, and west of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary line between the United States and Spain; running thence up the said river Chattahoochee, and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee (being the first considerable stream on the western side above the Cussetas and Coweta towns) empties into the said Chattahoochee river; thence in a direct line to Nickajack, on the Tennessee river; thence crossing the said last-mentioned river; and thence running up the said Tennessee river, and along the western bank thereof, to the southern boundary line of the State of Tennessee.

*512 In answer to the first question, Georgia admits what is * alleged in the bill in relation to the definition of the boundaries of the Territory of Alabama by an act of Congress, passed in eighteen hundred and seventeen, and the subsequent grant of admission of the State of Alabama into the Union with the same boundaries in the year eighteen hundred and nineteen; and the conclusion from it is, simply, that the eastern boundary line of Alabama is the western boundary line of Georgia, but that, so far as that line runs along the western bank of the Chattahoochee river, Georgia denies that it runs along the usual or low-water mark; but, on the contrary, Georgia contends that it runs along the western bank at high-water mark, using high-water mark in the sense of the highest water-line of the river's bed; or, in other words, the highest water-line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth.

Georgia also answers affirmatively the other interrogatory in the bill with the same qualification, that what she claims is a right to exercise jurisdiction over all the lands up to the water-line of the western bank of the river's bed.

Georgia also says, that while she regards the description of the banks of the river given in the bill as highly drawn, she admits it to be more applicable to the southern part of the bank than to that part of it sixty or seventy miles above the thirty-first degree of north latitude. It is admitted that in some places the banks are flat, but that in other places, especially in the upper portion of the river, the banks are generally steep and well defined, so much so as to be familiarly known as the "Bluffs of the Chattahoochee;" and that the banks of

the river in a number of places along the dividing line between the two States are low and flat, and that in freshets the water spreads as far as half a mile beyond the line to the west, and in a few places further than the western line of the river's bed, over low lands, which Georgia does not claim to be under its jurisdiction.

These declarations and admissions upon the part of Georgia simplify the controversy, and narrow it to the claim of the respective parties as heretofore set forth.

*513 The contract of cession must be interpreted by the words * of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and States as to their ownership and jurisdiction on the soil of rivers within their banks and beds. Such authorities are to be found in cases in our own country, and in those of every nation in Europe.

Woolrych defines a river to be a body of flowing water of no specific dimensions—larger than a brook or rivulet, less than a sea—*a running stream, pent on each side by walls or banks.*

Grotius, ch. 2, 18, says a river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks, and running in such and such channel. Hence, there is water having a bank and a bed, over which the water flows, called its channel, meaning, by the word channel, the place where the river flows, including the whole breadth of the river.

Bouvier says banks of rivers contain the river in its natural channel, where there is the greatest flow of water.

Vattel says that the bed belongs to the owner of the river. It is the running water of a river that makes its bed; for it is that, and that only, which leaves its indelible mark to be readily traced by the eye; and wherever that mark is left, there is the river's bed. It may not be there to-day, but it was there yesterday; and when the occasion comes, it must and will—unobstructed—again fill its own natural bed. Again, he says, the owner of a river is entitled to its whole bed, for the bed is a part of the river.

Mr. Justice Story, in Thomas and Hatch, 3 Sumner, 178, defines shores or flats to be the space between the margin of the water at a low stage, and the banks to be what contains it in its greatest flow; Lord Hale defines the term shore to be synonymous with flat, and substitutes the latter for that expression.

Mr. Justice Parker does the same, in 6 Mass. Reports, 436, 439.

*514 Chief Justice Marshall says the shore of a river borders on * the water's edge; and the rule of law, as declared by the court in 5 Wheat., 379, is, that when a great river is a boundary between two nations or States, if the original property is not in either, and there be no convention about it, each holds to the middle of the stream.

Virginia, in her deed of cession to the United States of the territory northwest of the Ohio, fixed the boundary of that State at low-water mark on the north side of the Ohio; and it remains the limit of that State and Kentucky, as well as of the States adjacent, formed out of that territory. 3 Dana Kentucky Reports, 278, 279; 5 Wheaton, 378; Code of Virginia, 1849, pp. 49, 34;

1 St. Ohio, 62. By compact between Virginia and Kentucky, the navigation is free. A like compact exists between New York and New Jersey, as to the Hudson river and waters of the bay of New York and adjacent waters.

Webster's definition of a bank is a steep declivity rising from a river or lake, considered so when descending, and called acclivity when ascending.

Doctor Johnson defines the word bank to be the earth arising on each side of a water. We say properly the shore of the sea and the bank of a river, brook, or small water. In the writings of our English classics, the two words are more frequently used in those senses; for instance, as when boats and vessels are approaching the shore to communicate with those who are upon the banks.

Bailey, in his edition of the Universal Latin Lexicon of Facciolatus and Forcellinus, says that ripa, the bank of a river, is *extremitas terræ quod aqua alluitur et proprie dicitur de flumine; ut litus de mare, nam hoc depressum est declive atque humile, ripa altior fere est præruptior;* and again, *ripa recte definitur id quod flumen continet, naturalem vigorem cursus sui tenens.*

Notwithstanding that there are differences of expression in the preceding citations, they all concur as to what a river is; what its banks are; that they are distinct from the shore or flat, and as to what constitutes its channel.

With these authorities and the pleadings of this suit in view, all of us *515 reject the low-water mark claimed by Alabama * as the line that was intended by the contract of cession between the United States and Georgia. And all of us concur in this conclusion, that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee river and along the western bank thereof.

We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil *which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.*

The western line of the cession on the Chattahoochee river must be traced on the water-line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion.

By the contract of cession, the navigation of the river is free to both parties.

Ex Parte. In the Matter of the Commonwealth of Kentucky, one of the United States of America, by Beriah Magoffin, Governor, and the Executive Authority thereof, Petitioner, v. William Dennison, Governor and Executive Authority of the State of Ohio.

Supreme Court of the United States, 1860.

[24 *Howard*, 66.]

1. In a suit between two States, this court has original jurisdiction, without any further act of Congress regulating the mode and form in which it shall be exercised.
2. A suit by or against the Governor of a State, as such, in his official character, is a suit by or against the State.
3. A writ of mandamus does not issue in virtue of any prerogative power, and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy.
4. The words "treason, felony, or other crime," in the second clause of the second section of the fourth article of the Constitution of the United States, include every offence forbidden and made punishable by the laws of the State where the offence is committed.
5. It was the duty of the Executive authority of Ohio, upon the demand made by the Governor of Kentucky, and the production of the indictment, duly certified, to cause Lago to be delivered up to the agent of the Governor of Kentucky who was appointed to demand and receive him.
6. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment.
7. The word "duty," in the act of 1793, means the moral obligation of the State to perform the compact in the Constitution, when Congress had, by that act, regulated the mode in which the duty was to be performed.
8. But Congress cannot coerce a State officer, as such, to perform any duty by act of Congress. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him.
9. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up Lago; and, upon that ground only, this motion for a mandamus was overruled.

A MOTION was made in behalf of the State of Kentucky, by the direction and in the name of the Governor of the State, for a rule on the Governor of Ohio to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to the State of Kentucky, having jurisdiction of the crime with which he is charged.

*67 * The facts on which this motion was made are as follows:

The grand jury of Woodford Circuit Court, in the State of Kentucky, at October term, 1859, returned to the court the following indictment against the said Lago:

WOODFORD CIRCUIT COURT.

The Commonwealth of Kentucky against *Willis Lago, free man of color.*

The grand jury of Woodford county, in the name and by the authority of the Commonwealth of Kentucky, accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, &c., committed as follows, namely:

the said Willis Lago, free man of color, on the fourth day of October, 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky.

W. S. DOWNEY, *Com. Attorney.*

On the back of said indictment is the following endorsement:

"A true bill; L. A. Berry, foreman. Returned by grand jury, October term, 1859."

A copy of this indictment, certified and authenticated, according to the act of Congress of 1793, was presented to the Governor of Ohio by the authorized agent of the Governor of Kentucky, and the arrest and delivery of the fugitive demanded.

The Governor of Ohio referred the matter to the Attorney General of the State of Ohio, for his opinion and advice, and received from him a written opinion, upon which he acted, and refused to arrest or deliver up the fugitive, and, with his refusal, communicated to the Governor of Kentucky the opinion of the Attorney General, to show the grounds on which he refused. The written opinion of the Attorney General is as follows:

OFFICE OF THE ATTORNEY GENERAL,
Columbus, Ohio, April 14, 1860.

*68 SIR: The requisition, with its accompanying documents, * made upon you by the Governor of Kentucky, for the surrender of Willis Lago, described to be a "fugitive from the justice of the laws of" that State, may, for all present purpose, be regarded as sufficiently complying with the provisions of the Federal Constitution and the act of Congress touching the extradiction of fugitives from justice, if the alleged offence charged against Lago can be considered as either "treason, felony, or other crime," within the fair scope of these provisions.

Attached to the requisition is an authenticated copy of the indictment on which the demand is predicated; and this, omitting merely the title of the case and the venue, is in the words and figures following:

"The grand jury of Woodford county, in the name and by the authority of the Commonwealth of Kentucky, accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, &c., committed as follows, viz: the said Willis Lago, free man of color, on the fourth day of October, 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky."

This indictment, it must be admitted, is quite inartificially framed, and it might be found difficult to vindicate its validity according to the rules of criminal pleading which obtain in our own courts, or wheresoever else the common law prevails. This objection, however, if it have any force, loses its importance in the presence of other considerations, which, in my judgment, must control the fate of the application.

The act of which Lago is thus accused by the grand jury of Woodford county certainly is not "treason," according to any code of any country, and just as certainly is not "felony," or any other crime, under the laws of this State, or by the common law. On the other hand, the laws of Kentucky do denounce this act as a "crime," and the question is thus presented whether, under the
*69 Federal Constitution, one State is * under an obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offence not known to the laws of the former, nor affecting the public safety, nor regarded as *malum in se* by the general judgment and conscience of civilized nations.

This question must, in my opinion, be resolved against the existence of any such obligation. There are many acts—such as the creation of nuisances, selling vinous or spirituous liquors, horse racing, trespassing on public lands, keeping tavern without license, permitting dogs to run at large—declared by the laws of most of the States to be crimes, for the commission of which the offender is visited with fine or imprisonment, or with both; and yet it will not be insisted that the power of extradition, as defined by the Constitution, applies to these or the like offences. Obviously a line must be somewhere drawn, distinguishing offences which do from offences which do not fall within the scope of this power. The right rule, in my opinion, is that which holds the power to be limited to such acts as constitute either treason or felony by the common law, as that stood when the Constitution was adopted, or which are regarded as crimes by the usages and laws of all civilized nations. This rule is sufficiently vindicated by the consideration that no other has ever been suggested, at once so easy of application to all cases, so just to the several States, and so consistent in its operation with the rights and security of the citizen.

The application of this rule is decisive against the demand now urged for the surrender of Lago. The offence charged against him does not rank among those upon which the constitutional provision was intended to operate, and you have, therefore, no authority to comply with the requisition made upon you by the Governor of Kentucky.

Entertaining no doubt as to the rightfulness of this conclusion, I am highly gratified in being able to fortify it by the authority of my learned and eminent predecessor, who first filled this office, and who officially advised the Governor of that day, that in a case substantially similar to the one now presented, he
*70 ought not to issue his warrant of extradition. * Other authority, if needed, may be found in the fact that this rule is conformable to the ancient and settled usage of the State.

To guard against possible misapprehension, let me add that the power of extradition is not to be exercised, as of course, in every case which may apparently fall within the rule here asserted. While it is limited to these cases, the very nature of the power is such, that its exercise, even under this limitation, must always be guided by a sound legal discretion, applying itself to the particular circumstances of each case as it shall be presented.

The communication, in a formal manner, of the preceding opinion, has been long but unavoidably deferred by causes of which you are fully apprised. Though this delay is greatly to be regretted, it can have had no prejudicial effect, as the agent appointed by the Governor of Kentucky to receive Lago was long since

officially, though informally, advised that no case had been presented which would warrant his extradition.

Very respectfully, your obedient servant,

C. P. WOLCOTT.

To the Governor.

Some further correspondence took place between the Governors, which it is not necessary to state; and the Governor of Ohio, having finally refused to cause the arrest and delivery of the fugitive, this motion was made on the part of Kentucky.

Upon the motion being made, the court ordered notice of it to be served on the Governor and Attorney General of Ohio, to appear on a day mentioned in the notice. The Attorney General of Ohio appeared, but under a protest, made by order of the Governor of Ohio, against the jurisdiction of the court to issue the mandamus moved for.

The case was fully argued by *Mr. Stevenson* and *Mr. Marshall* on behalf of the State of Kentucky, and by *Mr. Wolcott,* the Attorney General of Ohio, on the part of that State.

*71 The great importance of the principles involved in this case * has induced the reporter to allow a large space to the arguments of the respective counsel.

That of *Messrs. Cooper* and *Marshall* and *Mr. Stevenson,* for the State of Kentucky, was as follows:

The State of Kentucky, interested in the preservation of the integrity of her own laws, and in the punishment of such as offend against them on her own soil, comes, as a party plaintiff in this proceeding, before the Supreme Court of the United States, as a court of original jurisdiction, to ask for a mandamus against Mr. Dennison, who is the Governor of Ohio, and as such, exercises the Executive authority of said State.

The second paragraph of section 2, article 4, of the Constitution of the United States, reads thus;

"A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

To execute this obligation of the Constitution the act of Congress of 1793 was passed, (Statutes at L., 302, sec. 1,) in which, by the first section, the duty to be performed, and the person by whom to be performed, in the event of a demand under the Constitution, are prescribed. That duty is simple, and is stated thus:

"It shall be the duty of the Executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the Executive authority making such demands, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

One Lago, who was indicted for an act denounced as a crime by the law of Kentucky, fled, and was found in Ohio, and was demanded by Governor Magoffin, the Executive authority of the State of Kentucky, of Governor Dennison, the Governor of Ohio, and at the time Executive authority thereof. All the

*72 conditions were observed to complete a proper demand, according * to the act of Congress. It is further shown that, for reasons set forth in the official reply of Governor Dennison, as Executive authority of Ohio, the demand was not complied with, and that he refused to arrest Lago at all. Upon that refusal this proceeding is taken.

The Commonwealth of Kentucky is properly the plaintiff in this case.

"Where an application is made, the object of which is to obtain the benefit of certain provisions of an act of Parliament, &c., those for whose benefit such provisions were inserted in the act, &c., should be the applicants for the rule, although they may be neither specially nor nominally mentioned."

Tapping on Mandamus, 289.

The duty prescribed by the Constitution and law was to have been performed by the defendant, Dennison, as the officer wielding the Executive authority of the State of Ohio. He is, therefore, the proper person against whom to institute the proceeding.

Is mandamus the proper remedy? We will not extend this brief by reciting what is said of the authority of the Court of B. R. over mandamus. It had been used since the days of Edward II, in England, and has been the suppletory police power of the kingdom.

Tapping on Mandamus, 5—30.
Cowp., 378; 2 B. and C., 198.
Burrows, 1265—'68.
15 East., 135.
3 Blacks. Com., 110.

In this court it is acknowledged as an action, a case, rather than as a "prerogative writ."

The proceeding on mandamus is a case within the meaning of the act of Congress. It is an action or suit brought in a court of justice, asserting a right, and is presented according to the forms of judicial proceeding.

12 Peters, 614; 2 Peters, 450.

It is not by the office of the person to whom the writ is directed, but *73 the nature of the thing to be done, that the propriety * or impropriety of issuing a mandamus is to be determined.

1 Cranch, 170.

This court (in 3 Howard, 99) treats the mandamus as "an action," and that "a party is entitled to it when there is no other adequate remedy." This court refuses to entertain the action of assumpsit for matter which might have been proved on a former action of mandamus.

There is no remedy for the grievance inflicted on the State of Kentucky by the refusal of Governor Dennison, unless the mandamus applied for will lie. If mandamus will lie in any case where the Supreme Court exercises original jurisdiction, all considerations and conditions concur to point it out as the proper remedy in this case; for—

1. The duty to be performed is single, simple, only ministerial and public in its nature and office.

2. The party directed to perform it is certainly named.

3. No other adequate remedy exists or is prescribed by law.

4. The duty is distinctly prescribed by the Constitution and the act of 1793.

5. The office held by Mr. Dennison does not shield him from the performance; "it is the nature of the duty which determines the propriety of mandamus as a remedy."

The Supreme Court of the United States has never adjudicated the question of this remedy as now it is presented.

In the case of the United States *v.* Lawrence, 3 Dallas, 53, (A. D. 1795,) this court was applied to as a court of original jurisdiction, and it entertained the jurisdiction. The case was disposed of on the point, that the duty of Judge Lawrence involved the exercise of a discretion in the execution of his office which this court could not control.

In the case of Marbury *v.* Madison, 1 Cranch, 175, a careful reading of the opinion will show that the mandamus was refused because the act of 1789 was unconstitutional, in so far as it disturbed the constitutional distribution of the judicial power of this court. The application was to this court, in its
*74 original jurisdiction, whereas the case belonged to it only * under its appellate jurisdiction, and therefore the rule was discharged.

In McIntyre *v.* Wood, 7 Cranch, 504, the point was as to the power of the Circuit Court of the United States; and the same remark applies to the case of McCluney *v.* Silliman, 6 Wheat., 600. The reasoning of those cases is sufficiently satisfactory, but it has no application in this case.

Ex parte Roberts, 6 Peters, 216, and Ex parte Davenport, 6 Peters, 664, were applications to control the judge of an inferior court by mandamus, which were refused because of the discretion the inferior officer had the right to exercise. Ex parte Bradstreet, 8 Peters, 634, and Ex parte Story, 12 Peters, 339, were cases addressed to this court, in the exercise of its appellate jurisdiction; so was the case of Kendall *v.* United States, which was very elaborately argued, 12 Peters, 525 to 655. Ex parte Guthrie, and all the rest of the cases of the applications for mandamus, have been to this court as an appellate court. This is the first case in our judicial history in which a mandamus has been asked for in a case falling properly within the original jurisdiction of the Supreme Court.

The judicial power of the United States is vested, by the Constitution, in the Supreme Court, and in such inferior courts as Congress may from time to time establish. This power "shall extend" to a number of classes of cases, among which are "all cases in law or equity arising under this Constitution, the laws of the United States," &c., &c., and, within the enumerated classes, "in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.

It is respectfully submitted that, under these constitutional grants of power and jurisdiction, this court may, *debito justitiæ,* entertain the application for mandamus where a State is a party, and this without resort to the act of Congress distributing the means of enforcing the jurisdiction. The judicial power, so far as this jurisdiction of the court is concerned, is vested by the Constitution; it would neither remain dormant, nor would it expire, though the Legislative power had never passed a law to authorize certain processes to assert such jurisdiction. We adopt the view taken by the counsel in the case of the
*75 * United States *v.* Peters, 3 Dallas, 126: "The judicial power is abstract or relative; in the former character, the court, for itself, declares the law and distributes justice; in the latter, it superintends and controls the conduct of other tribunals by a prohibitory or mandatory interposition. This superintending authority has been deposited in the Supreme Court by the Federal Constitution, and it becomes a duty to exercise it upon every proper occasion." "It is certain the Constitution fixes no limitation to the exercise of this power by this court upon the subject; nor does the law, but by the implication in the 14th section of the act of 1789, that the writs issued shall be allowable by principle and usage," and necessary to the exercise of the jurisdiction belonging to the court. If mandamus would then be granted by the Court of King's Bench, *debito justitiæ,* it can be issued in a case of original jurisdiction, upon a proper showing, by

this court; and the express power is extended by the 14th section of the judiciary act of 1789, if the writ is necessary to the exercise of the jurisdiction belonging to the court.

If mandamus should not be regarded as a "prerogative writ," but as an action, a case, it falls, in this matter, directly within the vested power and original jurisdiction of the court, and can be entertained independently of the judiciary act, as a constitutional "power" of this court.

Where is the great conservative power which is to regulate State sovereignties in the execution of their constitutional obligations, if this court renounces, or shrinks from, the legitimate exercise of the functions with which it is invested by the Constitution?

The original jurisdiction of this court is limited to those cases in which foreign ambassadors, ministers, consuls, and American States, are interested; but in this range it has no limit. There is no judge who can interpose to exercise power over them but this court, in its original jurisdiction. From the very nature of the Constitution, the great police power of the mandamus, as between the States, is a necessity to the exercise of the jurisdiction conferred on this court. Therefore, Kentucky approaches this tribunal with the vio-
*76 lated * obligation of Ohio in one hand, and with the Constitution in the other, conferring full jurisdiction on this court, as a court of original jurisdiction in all cases in law or equity in which a State is a party, and shows that, for the grievance she suffers, there is no legal remedy but mandamus.

"It is the case which gives the jurisdiction, not the court." 1 Wheat., Martin *v.* Hunter's Lessee.

Under the precepts of the law of nations, the obligation to deliver fugitives from justice touched only a few classes of criminals—those whose crimes "touched the State," or were so enormous as to make them *hostes humani generis* —poisoners, assassins, &c. These were delivered up, when convicted, or tried, and sometimes before. This was done for comity. Vattel, Book 1, c. 19; B. 2, c. 6.

The character of this obligation was more frequently rendered certain by treaty, as in our treaties with Great Britain and France. But the Constitution of the United States has, among the States of the Union, extended and enlarged the rule of the publicists. Whereas they obeyed the demand in cases of criminals "convicted or tried," our States obey the demand where a person is charged with treason, felony, or other crime; whereas they only obeyed the demand in cases of heinous crimes, our States enter into the obligation for "other crime," making their obligation as broad as the word crime can be extended. Crime can be extended in its signification. Crime is synonymous with misdemeanor, (4 Black. Com., 5,) and includes every offence below felony punished by indictment as an offence against the public, (9 Wendell, 222.) We know that, in the first draft of this clause of the Constitution, the words "high misdemeanor" were used. They were stricken out, and "other crime" inserted, because "high misdemeanor" might be technical and too limited. The framers wanted "to comprehend all proper cases." (5 Elliott, 487.) To use the language of a learned judge, "there is a dependence that justice will be done; and the Constitution rests on this confidence for the vindication of the compact for 'a more perfect Union.'"

*77 The Constitution reposes in the Federal Government the * discretion of conducting the foreign intercourse of these States with foreign Powers. This is manifest by the power given to the Executive "to receive ambassadors, public ministers, and consuls, and, by and with the consent of the Senate, to appoint ambassadors and other public ministers, and consuls," and, by and with

the consent of the Senate, to make treaties. The correlative inhibitions to the States are expressed in the same instrument: "No State shall enter into any treaty, alliance, or confederation." Article 1, section 10: "No State shall enter into any agreement with a foreign Power," &c. This court has coincided with the view here expressed, in the opinion rendered in the case of Holmes *v.* Jennison, 14 Pet., 575. A Governor of one of these United States cannot surrender a fugitive from justice from a foreign country to the agents of that Power. This is exclusively within the sphere of the Federal Power. *Ib.*

The Constitution is harmonious in its complicated structure. As the Federal Government is the repository of the power over foreign intercourse, so the inter-State intercourse is established upon a fixed and stable basis, by dispensing with comity and the rule of the publicists, and making the obligation to render criminals to the jurisdiction they have offended a perfect obligation, in express constitutional compact. The States have left themselves no discretion on this subject. They cannot enlarge, diminish, abridge, or modify, the constitutional arrangement: "No State shall, without the consent of Congress, enter into any agreement or compact with another State," &c.

Congress cannot waive an express and mandatory provision of the Constitution. A person charged with treason, felony, or other crime, &c., shall be delivered up, &c. Can two of these States negotiate with each other a modification of this obligation? Certainly not. Can they with the consent of Congress? Certainly not. It is a fixed, well-defined, and perfect obligation, which furnishes all the essentials for its own execution, if properly considered, as an inter-State obligation, subject to the Judicial branch of the Government to
*78 enforce its due and proper execution. It expresses plainly * what is to be done, upon whose demand it is to be done, the circumstances under which it is to be done, and the purpose for which it is to be done. By whom it is to be done, the Constitution did not prescribe; for, it may be, that was a matter in which the State might have a choice. Congress acted; yet the Executive of the State was left to be guided by his State authority or his own responsibility as to the mode in which he would cause the arrest and delivery of the fugitive; but, beyond this simple and single ministerial performance, the Constitution and the law have left him no discretion whatever. He is a mere instrument of the Constitution, pointed out by the law, because he holds the Executive authority of his State, and is a sworn officer of the Constitution of the United States, bound by his oath to observe its mandates, and the laws of the United States made in pursuance thereof, as the supreme law of the land, even in preference to those of his own State. The Executive authority of the State was indicated, because the duty to be performed was of a very delicate nature, and a discourteous exhibition of power within the demesnes of a State was to be avoided, such as arresting one, without regular process, who might be within the protection of the State.

It would not be within the right or competency of the State of Ohio to refuse this delivery. All her departments could not make a law effective to prevent it. Can her Executive alone avoid it? If he can, why may not any one else, no matter how appointed or in what way qualified? Another could not be qualified by a stronger oath to support the Constitution, and the laws of the United States made in pursuance of it; for the Constitution requires this Executive to take that oath, and qualifies his right to the gubernatorial chair of his State by the fact of his taking or refusing to take that oath. Were he to refuse, as Governor of Ohio, to take the oath to support the Constitution of the United States, and to maintain the laws made in pursuance thereof, is there no power, by mandamus, in the Judicial Department of this Government, to compel obedience to a duty expressed on the face of the Constitution?

*79 * The State of Ohio must be considered as yet willing to abide by her constitutional obligation, for this refusal is not the act of the Government of the State; it is only the act of her Executive, of one department of her Government. The State is bound so strongly by the terms of the Constitution, she cannot refuse. If, then, she is consenting, and Kentucky is demanding, and only Mr. Dennison refusing, it remains to be seen whether there resides in the Judicial Department of the Federal Government power to compel him to the performance of a ministerial duty assigned to him by law, in order to execute the inter-State covenants inscribed in the Constitution. In that memorable case of Prigg *v.* Pennsylvania, (16 Pet., 539,) several leading principles of construction were asserted, to the observance of which we now invite the attention of this court.

1. When the end is required, the means are given; when the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.

2. The General Government is bound, through its own departments, Legislative, Judicial, or Executive, as the case may be, to carry into effect all the rights and duties imposed upon it by the Constitution

We are perfectly aware that reliance may be placed on the very case from which these principles are extracted, to prove that the obligation to deliver the fugitive from justice is "exclusively Federal," and that, therefore, it may be insisted that Congress cannot direct a State Executive authority to execute it, but must impose this duty on some person who will be amenable, as belonging to one of the departments of the Federal Government. The court says the obligation is "exclusively Federal"—that "the States cannot be compelled to enforce it." From this *dictum* the inference is drawn that, if the person indicated to perform the duty, (though it be only ministerial,) holds any office under the State Government, this court cannot or will not compel him to perform the duty, but will wait for Congress to remodel the legislation of 1793, so as to make the person exclusively a Federal officer. We resist the propriety of *80 such inference from the points decided * by the court in Prigg's case. The court alluded to the resort which the claimant of a fugitive from service must have to the Judiciary to ascertain a fact, in order to support a right upon the finding of the fact, and did intimate that the action of the State magistracy was voluntary, though valid, unless prohibited by the State. In the case of a fugitive from justice, however, there is no fact to be ascertained, no question to be adjudicated, no necessity to appeal to any one to support a right, but simply to deliver upon a demand. Will it be replied that, to afford even this facility, Congress must, by law, indicate who is to perform the duty? We rejoin, that Congress has so indicated by the act of 1793. As well might the defendant plead his citizenship or inhabitancy in Ohio to relieve him, as that he is relieved by being Governor, or holding an office by authority of the State. The power of this Government extends so far that the performance of a public duty may be demanded, and the incumbent of a particular office may be required to perform it, especially where the duty is only ministerial, though at the same time he may be in office in the State. We think it is eminently proper that the Executive authority of the State should be the power indicated for the performance of this duty; because that officer is, at the same time, sworn to support the Constitution of the United States, and the laws of Congress made in pursuance thereof; and because he represents the State on which the demand is made, and is bound by the constitutional compact on which the demand is founded.

The obligation is said to be "exclusively Federal." Does it not bind the State of Ohio? Is it not from her power the compact subtracts? We think

the State has peculiarly come under the obligation expressed in the clause in question. Her hands are tied by the clause. Without the clause she might have been guided by her own discretion or by comity; now she is obliged, by the terms of the covenant to which she has consented. It may be she cannot be compelled to enforce the delivery of the fugitive; it may be the General Government is compelled, through its own departments, "to carry this into effect;"
*81 but that necessity does not shift the obligation. * The citizen owes obedience to the law, and is under obligation to perform the duties the law enjoins; but, if he fails, the court enforces the law, and secures the right which was infringed by the violation of the duty. Nothing can be more familiar than an obligation resting upon one party, and the right and power to enforce its execution vested in another. We submit, very respectfully, that this is just the case under our Constitution. The obligation to surrender the fugitive from justice rests upon the State; the power and duty to enforce the obligation reside in the General Government. The State of Virginia failing in 1790 to deliver certain fugitives upon the demand of Governor Mifflin, of Pennsylvania, he brought the facts before the President, and the act of 1793 was the consequence, whereby the Executive of the State was directed to perform the duty answering such demand. Every condition has been met. They who would escape the conclusion at which we wish to arrive must take the position not only that, in our system, the States may prohibit the use of their State agencies to the General Government in carrying the supreme law into effect within their boundaries, but this further position, that it is not in the power of the Federal Government to demand of any one in a State to perform a duty essential to the execution of the obligations inscribed in the Constitution.

We may well ask the Supreme Court to pause before ruling to this extent. When we remember that all Executive, Legislative, and Judicial officers, in the several States, are required, by the express letter of the Constitution of the United States, to be sworn "to support the Constitution," and that "the laws of Congress made in pursuance thereof are the supreme law of the land," overriding all State laws coming into conflict with them—that this body of State officers is bound solemnly to render obedience primarily to this supreme law, even in their respective jurisdictions, and though opposed to their State laws—it is difficult to comprehend the wisdom of that policy which teaches that those States can prohibit the use of these agencies in carrying into effect those very laws which the State has consented to observe as the supreme law, and its
*82 * agents have been sworn to support as paramount. It seems to us that the policy leads to a multiplication of officers, thus increasing the burdens of the people, and to conflicts between State and Federal agencies, by inculcating the idea that there is an incompatibility in the exercise of official fidelity to the State and Federal jurisdictions at the same time. Under our system of government, administered in its true spirit, there never can be a conflict. It is pernicious to the best interests to build on this foundation, for "a house divided against itself will fall." The State functionary owes allegiance and obedience to the Constitution of the United States, and the laws made in pursuance thereof, before everything else. The State owes the same obedience and observance to the same power. The Constitution enters and pervades our system everywhere. It surrounds the States and the people like an atmosphere vital to them, and ever in contact with them. To the officials of States, in every department of State Government, it is ever present with the oath to be rendered for its support, to remind them that, while they perform the functions of a limited jurisdiction, they are at the same time the conservative sentinels of that larger system, whose forces control the course and destiny of their State and of their

fellow-citizens. The planet of the heavens revolves upon its own axis, and pursues its peculiar orbit; but it, and all who inhabit it, are at the same time particles of an infinite system, whose balanced and regulated forces acting upon it assure its safety, and preserve it from destructive collision with the spheres that surround it. The planet and its inhabitants are not taught that they cannot obey the laws of the Great Architect and Ruler.

The Constitution of the United States engages three articles in asserting the construction of its departments of Government, defining their powers, and prohibiting the exercise of these to the States. So precise is it, that no restraint is laid upon a State but that an examination will prove it is because the same power [is] vested in the new Government. With the 4th article a new class is entered upon; they are not powers, but obligations and compacts, in which it is impossible to understand anything else (as it seems to us) than that the
*83 States are bound *inter se*, and are understood to be actors. They are a class of cases to be rendered effective by the action of the States, and by the action of the General Government—concurrent powers. The rule is well settled that in such cases, when Congress acts, the rule it establishes obtains.

We submit to the court that the case of Prigg *v.* Pennsylvania has been modified by the subsequent decision of Moore *v.* the People of Illinois, (14 Howard,) so far at least as to authorize State legislation, which is ancillary to the effectuation of the obligations to be "carried into effect" by the Federal power. We hope the court will not carry the exclusive action of the Federal power so far as to say that it cannot indicate "the Executive authority of a State" as the instrument to perform the purely ministerial act required by the 2d section, 4th article, of the Constitution.

We refer, especially, to the opinion of Justice McLean in Prigg's case, because it is directly in line with the views we now present, and seems to us to be conclusive.

The duty required of the Governor of Ohio, in arresting a fugitive from justice, results from an express obligation of his State, which he, as the Executive authority of that State, is directed by the act of seventeen hundred and ninety-three to carry out. He has no judgment to exercise touching the point of arrest. He cannot even hear a question on the point of identity of person, that a judge might hear on *habeas corpus*. He cannot consider the question of guilt or innocence.

9 Wendell, 221.

We refer to Clark's case because it is a strong case, adjudicated in the better days of the Republic by a patriotic public officer, who strove only to perform his duty under the law.

May every State Executive at pleasure violate the Constitution in its most direct mandates, and most express obligations? Has the Judicial power an arm not strong enough to reach him? If so, the obligations of the Constitution may at any time and under any pretext be avoided; the instrument is a myth.

Governor Dennison has mistaken his power in this matter, by assuming
*84 the discretion to judge in regard to the alleged * crime. The words of the Constitution are unambiguous. That the crime is to be judged by the law of the State through whose Executive the demand is made, appears from the Constitution itself, for the object of the delivery of the fugitive is, "that he may be removed to the State having jurisdiction of the crime." To say that the authority on whom the demand is made shall judge of the guilt of the party, or of the fact of the crime, or whether the alleged act is a crime, is to nullify the sense, object, and intent, of the framers of the Constitution, and to assume a supervisory power by the Executive of a State over the law-making and police powers

of another State. The police power of the States was reserved, and has never been surrendered to the Federal Government.

Moore *v.* the People of Illinois, 14 Howard, 18.
11 Pet., 139.

The Governor of Ohio, in refusing the demand, has not denied his general responsibility, under the Constitution and law of the United States, to make delivery of a fugitive from justice. His refusal was based upon the allegation that the offence charged in the Kentucky indictment was not crime, according to the signification of that word in the Constitution, and that therefore there was no obligation to deliver arising under the compact, nor springing from comity, because the offence was not known to civilized nations generally, to the common law, or to the statutes or polity of Ohio. In the views we have submitted already as to the duty of Governor Dennison, these positions are controverted. To confine the term to such offence as was denominated crime at the date of the Constitution, would give a restricted operation to the instrument, which would vastly impair its adaptation to the progress and wants of society. It would, in effect, destroy the force of this clause of the Constitution at its inception, and, instead of placing the States in bonds of mutual obligation to vindicate the jurisdiction of each other through future years, would make each a supervisor of the police power of the others, and, by reason of conflicting policies in their progress, would inevitably lead to alienation, confusion, and
*85 ultimate discord. "The instrument was not intended to provide * merely for the exigencies of a few years, but was to endure through a lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. . . . Hence its powers are expressed in general terms," &c.

1 Wheat., 305, 326.

The instrument was intended not only for those who framed it, but for posterity; not merely for the society of 1787, but for American society in all future time, and embraced in the word "crime" not merely what was punishable by indictment at the date of the instrument, but whatever each State in its progress might so declare. If this be not true, this family of American States are not connected by links stronger than a rope of sand. We will not elaborate this point further in this place, but may, if deemed proper, dwell upon it hereafter, together with reference to such works as will justify the views we suggest.

It only remains for the counsel for the demandant to say that the State of Kentucky, in bringing this case before the Supreme Court, pursues the law as it exists, and asks its enforcement, if the law can be enforced. If the act of Congress has exceeded the power vested in Congress by the Constitution, and we have been, since 1793, acting through instruments over which the Government has no control, Kentucky desires, through the Supreme Court, to know the fact, so that Congress may, without delay, so treat this important subject as hereafter to assure the faithful and prompt execution of this clause of the Constitution. To her it is a vital question; as to all the other States, in fact, whose institutions are similar to hers.

The argument of *Mr. Wolcott,* on behalf of the State of Ohio, was as follows:

I. The Government of the United States is one of limited and enumerated powers, derived primarily from the specific grants of the Constitution, which is at once the source and the law of all its being. It is a necessary correlative of this proposition, and one declared by the fundamental law itself, that
*86 each State still retains complete, exclusive, and supreme * power, over all

persons and things within its limits, where that power has not been specially granted or restrained by the Constitution; and that, in respect to all this mass of undelegated and unprohibited power, the States stand to each other and to the General Government as absolutely foreign nations.

Gibbons *v.* Ogden, 9 Wheat., 203—208.
Brown *v.* Maryland, 12 Wheat., 419, 443.
Wilson *v.* Blackbird Creek Co., 2 Peters, 251, 252.
Buckner *v.* Finley, 2 Peters, 586, 590.
New York *v.* Miln, 11 Peters, 102, 139.
United States Bank *v.* Daniel, 12 Peters, 32, 34.
Rhode Island *v.* Massachusetts, 12 Peters, 720.
License Cases, 5 How., 504, 588.

II. The Judicial Department of the Federal Government, sharing of necessity the intrinsic quality which marks that Government in its unity, is also one of limited and specific powers, and, in its tribunals of every grade, is subject to three conditions of universal application:

1. *Ex vi termini,* it is confined to the discharge of functions purely judicial in their nature.

Hayburn's Case, *in notis,* 2 Dall., 409.

2. These functions can be exerted only in the precise cases enumerated by the Constitution as subject to the judicial authority, and which, it has been said, range themselves in two general classes:

a. Cases in which the authority depends on the nature of the controversy, without respect to the character of the parties; and—

b. Cases in which the authority depends on the character of the parties, without regard to the nature of the controversy.

Cohens *v.* Virginia, 6 Wheat., 264, 293.

But this is evidently to be taken as subject to another qualification; for—

3. The judicial power exercised in these specific cases must be the "judicial power of the United States." In other words, the authority of the Judicial Department is restrained not only by the limitations specially affixed to it, but also by those more general considerations which grow out of the very nature
*87 * and purpose of a Federal Government. Thus the judicial power of the United States cannot extend to a controversy in which a State may, even by a purely civil action, pursue a citizen of another State for his violation of its municipal laws. Though in that instance the controversy would, as to its subject-matter, be one proper for judicial cognizance, in the general sense of that term, and would also, in respect of its parties, fall within the enumerated cases, yet no tribunal of the United States could entertain it, because all matters of merely internal concern have been kept by the States for their own original, exclusive, and sovereign control.

New York City *v.* Miln, 11 Pet., 139.
License Cases, 5 How., 588.

III. The Supreme Court of the United States, while fettered by each of the conditions so attaching to the whole Judicial Department—of which it is simply the highest organ—has been otherwise so narrowly confined as to permit it to wield, in an original form, only a very scant degree of the scant power confided to the range of the Judicial Department. The Constitution assumed the existence of, but did not create this tribunal, and it delineated the outlines of the judicial authority with which it might or should be endowed. Of necessity, all judicial power must be exerted in an original or appellate form, and the Constitution has declared the precise cases in which, under either of these forms, the judicial power of the United States may be imparted to the Supreme Court.

The original jurisdiction, (and the present inquiry concerns that alone,) thus permitted to it, is expressly limited to—

1. Cases "affecting ambassadors, other public ministers, or consuls;" and—

2. Cases "in which a State shall be a party," and, since the adoption of the eleventh amendment, in which a State shall be the plaintiff, or other pursuing party. This means, that a State, in its sole corporate capacity, shall be the "entire prosecuting party on the record," with a *persona standi in judicio* of its own—a direct legal or equitable right pertaining to it, as a distinct unity. It is not enough that it may be "consequentially affected or indirectly interested."

*88 * Fowler *v.* Lindsay, 3 Dall., 411.
United States *v.* Peters, 5 Cranch, 115, 139.
Osborne *v.* United States Bank, 9 Wheat., 738, 850—857.
United States Bank *v.* Planters' Bank, 9 Wheat., 904, 906.
Wheeling Bridge Case, 13 How., 518, 559.

IV. The Constitution does not, of itself, vest any power of action in the Supreme Court. It simply enables the court, under the regulating control of Congress, to exert judicial authority in the prescribed cases; but the existence in the court of the power itself, and the methods and instruments of its exercise, depend on the affirmative legislative action of Congress. The Supreme Court, in respect of both forms of its jurisdiction, is the organ of the Constitution and the law.

Chisholm *v.* Georgia, 2 Dall., 419, 432, 452.
Marbury *v.* Madison, 1 Cranch, 137, 173.
Bollman's Case, Ex parte, 4 Cranch, 75, 93, 94.
Wayman *v.* Southard, 10 Wheat., 1, 21, 22.
New York *v.* New Jersey, 5 Pet., 284, 290.
Crane's Case, Ex parte, 5 Pet., 190, 193.
Rhode Island *v.* Massachusetts, 12 Pet., 657, 721, 722.
Kendall *v.* United States, 12 Pet., 524, 622.
Christie's Case, Ex parte, 3 How., 293, 322.

The Congress, exercising its power in this behalf, has regulated the jurisdiction of this court, and its forms and mode of proceeding. These regulations, so far as they bear upon the present purpose, are substantially as follows:

1. The original cognizance of this court, as to cases in which a State is a party, has been limited to "controversies of a civil nature"—a limitation not expressed by the Constitution, and yet certainly effectual.

Judiciary Act, sec. 13.

2. Power has been given to the Supreme Court to issue two named writs: the writ of prohibition to a named court, for a named purpose; and the "writ of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

*89 * Judiciary Act. sec. 13.

The general authority to regulate its modes of proceeding conferred on this court by the "process act," (sec. 2,) and to issue "other writs," ancillary to the exercise of its jurisdiction, conferred by the judiciary act, (sec. 14,) does not enable the court to enlarge the uses of the writ of mandamus. The process act expressly shuts out from its operation "the forms of proceeding," which "are provided for by the judiciary act;" and the judiciary act, in terms, limits the court to the issue of "such other writs" as are "not specially provided for by statute." Moreover, on settled and necessary principles, the express grant of this writ, as against a specific class of functionaries—otherwise within the scope of its most ordinary uses, and to whom, as of course, it would run, without

distinct grant, if the court had a general authority to employ it—is a clear exclusion of any such authority, and an emphatic prohibition against the use of the writ in any other case, for any other purpose.

Christie, Ex parte, 3 How., 293, 322.

V. Arranging, in continuous order, the ascertained general conditions which limit the existence and exercise of the original jurisdiction of the Supreme Court in all possible cases, except only those "affecting ambassadors, other public ministers, and consuls," of whom there is now no question, it will be seen that no controversy can gain a foothold here, unless it be—

1. Appropriate for the action of judicial, as distinguished from political power.

2. Within the scope of "the judicial power of the United States," as distinguished from the general mass of judicial power reserved by and to the several States for their own exclusive exercise.

3. Instituted by a State, as the "entire party" plaintiff on record, in virtue of such direct legal or equitable interest in the subject-matter as, according to the ordinary rules applied to other parties, entitles it to "move" a case at law, or in equity, against a party subject to the control of the court.

*90 * 4. Of a "civil" as opposed to one of a criminal "nature;" and—

5. Conducted in a form of proceeding consistent with its subject-matter, with the character of its parties, and with the regulations prescribed by Congress for the use of that form of proceeding.

But the controversy, if a writ of mandamus can be so called, moved for by the present application, has no one of all these vital characteristics; for—

VI. The subject-matter of the controversy excludes it from discussion or adjudication by any judicial tribunal.

1. It is not appropriate for the action of judicial power, since it only concerns the execution of a compact between States—independent as to each other—for the extradition of fugitive offenders. Affecting the States at large as to their exterior relations, and their reciprocal national rights and duties, it is, in essence, a political question. Without express provision, committing them, under specific regulations, to the judicial authority, the performance of national engagements addresses itself to the department wielding the political power, and able to weigh political considerations. No such valid provision has been made in respect of this compact.

Marbury *v.* Madison, 1 Cranch, 137, 170.
United States *v.* Palmer, 3 Wheat., 610, 634, 670.
The Divina Pastora, 4 Wheat., 52, 63.
Foster *v.* Neilson, 2 Peters, 253, 307, 314.
Cherokee Nation *v.* Georgia, 5 Peters, 1, 20.
United States *v.* Arredondo, 6 Peters, 691, 735.

2. If fit for judicial cognizance under any circumstances, or by any tribunal, the subject of the proceeding is, nevertheless, not within the scope of the judicial power of the United States.

a. The Constitution has not granted any power to any department of the Federal Government concerning the reclamation of fugitives from justice, as between the States. The provision which it contains in this behalf is a simple engagement made by the States with each other, regulating matters of
*91 purely State concern, and addressed to the States alone. * If, as an original question, this interpretation could be doubted, it has become the fixed one by long usage and acquiescence. Since the foundation of the Government, each State has habitually determined for itself the extent of this obligation; many of them (and Kentucky is one, 1 Stanton's Rev. Stat., 557) have regulated its dis-

charge by express enactment; but never, until now, has the authority of the Federal Government been invoked to constrain its fulfilment. This practical exposition, acted upon for nearly eighty years, is too strong and obstinate to be shaken or controlled.

Note.—Upon this ground, as well as another, yet to be noticed, the act of Congress relating to fugitives from justice is clearly void. No inference of power in the Federal Government over this subject can be drawn from acquiescence in its provisions, for the act, in defining the cases to which it extends, follows the precise language of the stipulation itself, and, in terms, leaves its execution wholly to the authorities of the States themselves. The States, doubtless, have generally observed the rules it declares for the mere manner of surrender; not, however, as having the force of law, but by reason of their inherent fitness and convenience.

VII. The proceeding is not one in which a State is the pursuing party on the record; nor is any State so interested in its subject-matter as to be entitled to pursue here any form of controversy in respect to it; nor is the adversary party one over whom this court can, under any circumstances, or by any mode, exercise any control.

1. The writ of mandamus—as will hereafter more distinctly appear—is a prerogative writ, issued by the Government, in its own name, to its own functionaries, to redress or prevent a wrong done or threatened to itself as a Government. Awarded upon this ground and for this purpose, the Government is, of necessity, the prosecutor on the record. The relator is no "party" to the writ, and the writ constitutes the whole "case," or "controversy." If granted in this case, it will be a proceeding instituted by "The United States of America" against "The Governor of Ohio." Though the State of Kentucky may be
*92 interested in the performance of that duty, * yet the writ will issue upon reasons of public policy, simply to constrain the discharge of a public duty, imposed by the authority of the General Government, and essential to its own peculiar welfare. But if the applicant for the writ can be deemed the prosecuting party of record, still—

2. The Commonwealth of Kentucky has not such an interest in the discharge of the asserted duty as entitles her to set the writ in motion. The ground on which it must base its interest in the extradition of Lago is simply one phase of that general obligation, springing out of the social compact itself, which binds every organized political community to avenge all injuries aimed at the being or welfare of its society. Certainly, this is the first and highest of all governmental duties; but nevertheless it is, in juridical language, a "duty of imperfect obligation," incapable in its essence of precise exposition or admeasurement, and its fulfillment depends on moral and social considerations, accosting the community at large, which a judicial tribunal can neither weigh, define, nor enforce. But if there be any such right in this behalf as may constitute a foundation for legal proceedings to enforce it, then—

3. The claim made for the surrender of Lago must be prosecuted by the Executive authority, *eo nomine,* of the Commonwealth of Kentucky. That "authority" alone is empowered by the Constitution to demand the extradition, and, by parity of reason, can alone institute proceedings for its enforcement. But a suit by or against a State functionary, as such, is not a suit by or against the State itself.

Osborne *v.* United States Bank, 9 Wheat., 852, 859.
United States Bank *v.* Planters' Bank, 9 Wheat., 904.

4. The official personage against whom the writ is prayed is not subject, in any form or degree, to the jurisdiction of this court. The proceeding is

against him in his official character and respects his official duty; so that if from any cause the present incumbent of the office should, prior to the execution of the writ, be divested of his official position, the writ itself would, in the same instant and *ex necessitate rei,* fall impotent—a mere *brutum fulmen.*

*93 The proceeding, then, is aimed at the * supreme Executive of the State of Ohio, to "coerce" the exercise of one of its imagined functions. But no power has been confided to any Department of the Federal Government to impose a duty upon any functionaries of a State, or to constrain the discharge of their official concerns.

Martin *v.* Hunter's Lessee, 1 Wheat., 304, 336.
Houston *v.* Moore, 5 Wheat., 1, 21, 22.
Prigg *v.* Pennsylvania, 16 Peters, 539.

Note.—Upon this ground, also, the act of Congress relating to fugitives from justice, which speaks only to State authorities, is void.

VIII. The controversy raised by the motion is not of a civil nature. It involves no question of the rights of person or the rights of property. The power of the court is invoked simply in aid of the administration of the criminal code of Kentucky, to the end that she may be able to try Lago for an imputed offence against her laws, and, if guilty, to imprison him in her penitentiary.

IX. The original jurisdiction of this court cannot be exercised through the method of the writ of mandamus; and this disability springs as well from the inherent nature of the writ itself as from the regulations prescribed for its use by the Legislative power.

1. The nature and functions of the writ are so peculiar as to forbid its employment, save for a single purpose, by any of the courts of the United States. The writ comes to us from the common law; and this court has judicially determined that the common-law remedies in the Federal tribunals are to be according to the principles of that law as settled in England, (Campbell *v.* Robinson, 3 Wheat., 221,) subject, of course, to the modifications made by Congress, or under its authority, and also to such limitations as result from the constitution of the court and the nature of the Federal Government. According to these principles, this writ, as tersely defined by Lord Mansfield, is "a high prerogative one, flowing from the King himself, sitting in the Court of King's Bench, superintending the police, and preserving the peace of the country."

Rex *v.* Barker, 1 Bl. Rep., 300, 352.

*94 * Stated in a different form, the writ at common law is issued by a tribunal in which not only the judicial sovereignty, but the prerogative of general superintendency resides, and it is employed extra-judicially (Audley *v.* Jay, Popham, 176) as well as judicially. Its judicial use is to supervise the administration of the King's justice by his inferior judicatures; and its extra-judicial function is "to preserve peace, order, and good government," by constraining the prompt and rightful performance of every public duty confided to any public functionary or tribunal by "Parliament or the King's Charter."

Tapping on Mandamus, S. 6, 11, 12.
Bacon's Ab. Tit. Mandamus, A.
Butler's Nisi Prius, 195.
Rex *v.* Baker, 3 Burr, 1266.
Rex *v.* Bank of England, 2 Barn. and Ald., 622.
Rex *v.* Fowey, 2 Barn. and Cr., 596.
Rex *v.* North Riding, 2 Barn. and Cr., 290.
Rex *v.* E. C. Railway, 10 Ad. and El., 557.
Kendall v. United States, 12 Peters, 621.

But this court is one of very special and limited jurisdiction. The judicial sovereignty, in its general sense, does not reside here; and it has no prerogative power, no police power, no power to superintend the conduct of public affairs. All its attributes are purely judicial; and from its very constitution, the power to issue this writ, in the large sense of the common law, cannot be given to this court. Of necessity, it can employ the writ only in its judicial operation, and as a revisionary process directed to some inferior judicature charged with the administration of the justice of the Federal Government. Otherwise stated, the court cannot, under the Constitution, be empowered to issue the writ of mandamus, save to the inferior judicatures of the United States, in the exercise of its appellate jurisdiction.

Marbury *v.* Madison, 1 Cranch, 137, 176.

Kendall *v.* United States, 12 Peters, 524, 621.

2. The judicial act, as already noticed, in regulating the conditions under which the great common-law writs may be issued by this court, has inter-
*95 dicted the employment of this * writ, except as it may, agreeably to "the principles and usages of law," be directed against "courts appointed, or persons holding office, under the authority of the United States." (Sec. 13.) In effect, however, the power to issue the writ is not co-extensive with even the narrow boundaries so prescribed. For the court, considering the validity of this provision, and recognising the incompatibility of any of the common-law functions of the writ with the limited and peculiar nature of its original power, has solemnly determined that the Constitution prohibits it from issuing the writ, except to the courts of the Federal Government, in the exercise of its appellate jurisdiction.

Marbury *v.* Madison, 1 Cranch, 137, 176.

Kendall *v.* United States, 12 Peters, 524, 621.

But the party against whom the writ is now invoked does not come within either of the categories prescribed by the judicial act. The Governor of Ohio is not a "court appointed, or a person holding office, under the authority of the United States."

X. The results now attained demonstrate that the controversy which the present application seeks to inaugurate is, in its form and in its essence, in its whole and in its every part and element, beyond the utmost sweep of the jurisdiction of this court. The power to compose this national and political strife does not reside in this tribunal; the pursuing party cannot cross its threshold; the party pursued is without the reach of its arm; the subject of the difference has been excluded from its action; and the writ which it is solicited to grant has been denied to it as a method for the exercise of its original jurisdiction.

Mr. Chief Justice TANEY delivered the opinion of the court.

The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar.

Some of them, however, are not now for the first time brought to the attention of this court; and the objections made to the jurisdiction, and the
*96 form and nature of the process to * be issued, and upon whom it is to be served, have all been heretofore considered and decided, and cannot now be regarded as open to further dispute.

As early as 1792, in the case of Georgia *v.* Brailsford, the court exercised the original jurisdiction conferred by the Constitution, without any further legislation by Congress, to regulate it, than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court.

The same power was again exercised without objection in the case of Oswold *v.* the State of Georgia, in which the court regulated the form and nature of the process against the State, and directed it to be served on the Governor and Attorney General. But in the case of Chisholm's Executors *v.* the State of Georgia, at February term, 1793, reported in 2 Dall., 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel; and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in which these questions, as to the jurisdiction of the court, and the mode of exercising it, are elaborately examined.

Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction, and held that process served on the Governor and Attorney General was sufficient. Mr. Justice Iredell differed, and thought that further legislation by Congress was necessary to give the jurisdiction, and regulate the manner in which it should be exercised. But the opinion of the majority of the court upon these points has always been since followed. And in the case of New Jersey *v.* New York, in 1831, 5 Pet., 284, Chief Justice Marshall, in delivering the opinion of the court, refers to the case of Chisholm *v.* the State of Georgia, and to the opinions then delivered, and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words:

*97 "It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in * suits against a State, under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court, on the failure of the State to appear after due service of process, has been also prescribed."

And in the same case, page 289, he states in full the process which had been established by the court as a rule of practice in the case of Grayson *v.* the State of Virginia, 3 Dall., 320, and ever since followed. This rule directs, "that when process at common law, or in equity, shall issue against a State, the same shall be served upon the Governor or chief Executive magistrate and the Attorney General of such State."

It is equally well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of Kendall *v.* United States, 12 Pet., 615; Kendall *v.* Stokes and others, 3 How., 100.

So, also, as to the process in the name of the Governor, in his official capacity, in behalf of the State.

In the case of Madras[z]o *v.* the Governor of Georgia, 1 Pet., 110, it was decided, that in a case where the chief magistrate of a State is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely

in his official character, the State itself may be considered a party on the record. This was a case where the State was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the Governor in behalf of the State, and was indeed the form originally used, and always recognised as the suit of the State.

Thus, in the first case to be found in our reports, in which a suit was
*98 brought by a State, it was entitled, and set forth in * the bill, as the suit of "the State of Georgia, by Edward Tellfair, Governor of the said State, complainant, against Samuel Brailsford and others;" and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of "His Excellency Edward Tellfair, Esquire, Governor and Commander-in-Chief in and over the State of Georgia, in behalf of the said State, complainant, against Samuel Brailsford and others, defendants."

The cases referred to leave no question open to controversy, as to the jurisdiction of the court. They show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice. And that it has also been settled, that where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which every one is entitled, where it is the appropriate process for asserting the right he claims.

We may therefore dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by mandamus is the only mode in which the object can be accomplished.

This brings us to the examination of the clause of the Constitution which has given rise to this controversy. It is in the following words:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of
*99 the Executive authority of the * State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word "crime" of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called "misdemeanors," as well as treason and felony.

4 Bl. Com., 5, 6, and note 3, Wendall's edition.

But as the word crime would have included treason and felony, without specially mentioning those offences, it seems to be supposed that the natural

and legal import of the word, by associating it with those offences, must be restricted and confined to offences already known to the common law and to the usage of nations, and regarded as offences in every civilized community, and that they do not extend to acts made offences by local statutes growing out of local circumstances, nor to offences against ordinary police regulations. This is one of the grounds upon which the Governor of Ohio refused to deliver Lago, under the advice of the Attorney General of that State.

But this inference is founded upon an obvious mistake as to the purposes for which the words "treason and felony" were introduced. They were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offences were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offence. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are col-
*100 lected in Wheaton * on the Law of Nations, 171; Fœlix, 312; and Martin, Vergè's edition, 182. And the English Government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the States of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offences against the sovereignty of the State, as well as all other crimes. And as treason was also a "felony," (4 Bl. Com., 94,) it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it. For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government: and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered.

Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognised and acted on by the American colonies; for we find, by Winthrop's History of Massachusetts, vol. 2, pages 121 and 126,
*101 that as early as 1643, by "articles of Confederation * between the planta-

tions under the Government of Massachusetts, the plantation under the Government of New Plymouth, the plantations under the Government of Connecticut, and the Government of New Haven, with the plantations in combination therewith," these plantations pledged themselves to each other, that, upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner or such an offender at the time of the escape, the magistrate, or some of them, of the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof." It will be seen that this agreement gave no discretion to the magistrate of the Government where the offender was found; but he was bound to arrest and deliver, upon the production of the certificate under which he was demanded.

When the thirteen colonies formed a Confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But, as these colonies had then, by the Declaration of Independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded, so as to include treason and felony—that is; political offences—as well as crimes of an inferior grade. It is in the following words:

"If any person, guilty of or charged with treason, felony, or other high misdemeanor, in any State, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the Governor or Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence."

*102 * And when these colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially in the same words, but substituting the word "crime" for the words "high misdemeanor," and thereby showing the deliberate purpose to include every offence known to the law of the State from which the party charged had fled.

The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause new offences created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offences in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And, if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source

of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill-will.

The clause in question, like the clause in the Confederation, authorizes the demand to be made by the Executive authority of the State where the crime was committed, but does not in so many words specify the officer of the State upon whom the demand is to be made, and whose duty it is to have the fugitive delivered and removed to the State having jurisdiction of the crime. But, under the Confederation, it is plain that the demand was to be made on the Governor or Executive authority of the State, and could be made on no other de-
*103 partment * or officer; for the Confederation was only a league of separate sovereignties, in which each State, within its own limits, held and exercised all the powers of sovereignty; and the Confederation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a State. In the present Constitution, however, these powers, to a limited extent, have been conferred on the General Government within the territories of the several States. But the part of the clause in relation to the mode of demanding and surrendering the fugitive is, (with the exception of an unimportant word or two,) a literal copy of the article of the Confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the Confederation, must have been in the minds of the members of the Convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the Confederation—that is, of demanding the fugitive from the Executive authority, and making it his duty to cause him to be delivered up.

Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders, and to its early adoption by the colonies, and then by the Confederated States, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offence made punishable by the law of the State in which it was committed, and that it gives the right to the Executive authority of the State to demand the fugitive from the Executive authority of the State in which he is found; that the right given to "demand" implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled.

*104 This is evidently the construction put upon this article * in the act of Congress of 1793, under which the proceedings now before us are instituted. It is therefore the construction put upon it almost cotemporaneously with the commencement of the Government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the Congress which enacted the law.

The Constitution having established the right on one part and the obligation

on the other, it became necessary to provide by law the mode of carrying it into execution. The Governor of the State could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our institutions are founded, the Executive Department can act only in subordination to the Judicial Department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the Judicial Department. The Executive authority of the State, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the Executive authority of the State upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.

This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the Governor of the State where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or of Congress to authorize it. These difficulties presented themselves as early as 1791, in a
*105 demand made by the Governor * of Pennsylvania upon the Governor of Virginia, and both of them admitted the propriety of bringing the subject before the President, who immediately submitted the matter to the consideration of Congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the Constitution, which declares, "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, of every other State; and the Congress may by general laws prescribe the manner in which acts, records, and proceedings, shall be proved, and the effect thereof." And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between States, and the authentication of official documents—was in the minds of the framers of the Constitution, and had its influence in inducing them to give this power to Congress. And acting upon this authority, and the clause of the Constitution which is the subject of the present controversy, Congress passed the act of 1793, February 12th, which, as far as relates to this subject, is in the following words:

"Section 1. That whenever the Executive authority of any State in the Union, or of either of the Territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the Executive authority of any such State or Territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief Magistrate of the State or Territory from

whence the person so charged fled, it shall be the duty of the Executive authority of the State or Territory to which such person shall have fled to cause him or her to be arrested and secured, and notice of the arrest to be given to the Executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered
*106 to such agent when he shall appear; * but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

"Section 2. And be it further enacted, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or Territory from which he or she shall have fled; and if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."

It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress; and the certificate of the Executive authority is made conclusive as to their verity when presented to the Executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed. It is said in the argument, that the Executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every marshal and sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the Executive of the State under this law, when the
*107 demand is made upon him and the requisite evidence produced. The * Governor has only to issue his warrant to an agent or officer to arrest the party named in the demand.

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the Executive authority of the State of Ohio.

The demand being thus made, the act of Congress declares, that "it shall be the duty of the Executive authority of the State" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any
*108 duty whatever, and compel him to perform it; for if it * possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the State to carry it into execution.

It is true that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the State courts the same authority with the District Court of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers were for some years exercised by State tribunals, readily, and without objection, until in some of the States it was declined because it interfered with and retarded the performance of duties which properly belonged to them, as State courts; and in
*109 other States, doubts appear to have arisen as * to the power of the courts,

acting under the authority of the State, to inflict these penalties and forfeitures for offences against the General Government, unless especially authorized to do so by the State.

And in these cases the co-operation of the States was a matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution. And the acts of Congress conferring the jurisdiction merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience.

But the language of the act of 1793 is very different. It does not purport to give authority to the State Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no
*110 power delegated to the General Government, either * through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1870.

[11 *Wallace*, 39.]

1. This court has original jurisdiction, under the Constitution, of controversies between States of the Union concerning their boundaries.
2. This jurisdiction is not defeated because in deciding the question of boundary it is necessary to consider and construe contracts and agreements between the States, nor because the judgment or decree of the court may affect the territorial limits of the jurisdiction of the States that are parties to the suit.

3. The ordinance of the organic convention of the Commonwealth of Virginia, under which the State of West Virginia was organized, and the act of May 13th, 1862, of the said Commonwealth, constitute a proposition of the former State that the counties of Jefferson and Berkeley and others might, on certain conditions, become part of the new State; and the provisions of the constitution of the new State concerning those counties are an acceptance of that proposition.
4. The act of Congress admitting the State of West Virginia into the Union at the request of the Commonwealth of Virginia, with the provisions for the transfer of those counties in the constitution of the new State, and in the acts of the Virginia legislature, is an implied consent to the agreement of those States on that subject.
5. The consent required by the Constitution to make valid agreements between the States need not necessarily be by an express assent to every proposition of the agreement. In the present case the assent is an irresistible inference from the legislation of Congress on the subject.

*40 * The condition of the agreement on which the transfer of these two counties was to be made was, that a majority of the votes cast on that question in the counties should be found in favor of the proposition.

7. The statutes of the Virginia legislature having authorized the governor of that State to certify the result of the voting on that proposition to the State of West Virginia, if, in his opinion, the vote was favorable, and he having certified the fact that it was so, under the seal of the State to the governor of West Virginia, and the latter State having accepted and exercised jurisdiction over those counties for several years, the State of Virginia is bound by her acts in the premises.
8. The State of Virginia cannot under such circumstances be permitted to set aside the whole transaction in a court of equity, on the ground that no fair vote was taken, that her own governor was deceived and misled by the election officers, with no charge of fraud or improper conduct on the part of West Virginia, nor can she withdraw her consent two years after the vote was taken and the transfer of the counties accomplished.

On original bill to settle the boundary line between the States of Virginia and West Virginia, the case as existing in well-known public history and from the record being thus:

A convention professing to represent the State of Virginia, which assembled in Richmond in February, 1861, attempted by a so-called "ordinance of secession" to separate that State from the Union, and combined with certain other Southern States to accomplish that separation by arms. The people of the northwestern part of the State, who were separated from the eastern part by a succession of mountain ranges and had never received the heresy of secession, refused to acquiesce in what had been thus done, and organized themselves to defend and maintain the Federal Union. The idea of a separate State government soon developed itself; and an organic convention of the State of Virginia, which in June, 1861, organized the State on loyal principles—"the Pierpont government"—and which new organization was acknowledged by the President and Congress of the United States as the true State government of Virginia—passed August 20th, 1861, an ordinance by which they ordained that a new State be formed and erected out of the territory included within certain boundaries (set forth) including within those boundaries of the proposed new State

*41 * the counties of, &c. [thirty-nine counties being named]. These counties did not include as within the proposed State the counties of either Greenbrier, Pocahontas, Hampshire, Hardy, Morgan, *Berkeley*, or *Jefferson;* but the third section of the ordinance enacted that the convention might change the bound-

aries described in the first section of the ordinance so as to include within the proposed State the counties of Greenbrier and Pocahontas, or either of them, and also the other counties just above named, or either of them, "and also all such other counties as lie contiguous to the said boundaries or to the counties named," if the said counties to be added, or either of them, by a majority of the votes given, &c., should declare their wish to form part of the proposed State, and should elect delegates to the said convention, &c. The name of the new State as ordained by the ordinance was Kanawha.

The convention provided for by the ordinance met in Wheeling, November 26th, 1861, and made a "Constitution of West Virginia." Certain counties named, forty-four in number, "formerly part of the State of Virginia," it was ordained should be "included in and *form part* of the State of West Virginia." No one of the counties of Pendleton, Hardy, Hampshire, Morgan, Berkeley, or Jefferson, were among these forty-four. The constitution proceeded, in a second section:

"And if a majority of the votes cast at the election or elections held as provided in the schedule hereof, in the district composed of the counties of Pendleton, Hardy, Hampshire, and Morgan, shall be in favor of the adoption of this constitution, the said four counties shall be included in and form part of the State of West Virginia; and if the same shall be so included, and a majority of the votes cast at the said election or elections, in the district composed of *Berkeley, Jefferson,* and Frederick, shall be in favor of the adoption of this constitution, then the three last-named counties shall also be included in and form part of the State of West Virginia."

*42 All through the constitution, as, *ex. gr.,* in the fixing of * senatorial and representative districts, and of judicial circuits, provision was made for the case of these two sets of counties coming in, or of one set coming in without the other. A separate section ordained that—

"Additional territory may be admitted into, and become part of this State, with the consent of the legislature."

And it provided for the representation in the Senate and House of Delegates of such new territory.

By the terms of this constitution it was to be submitted to a vote of the people on the first Thursday in April, 1862; and on a vote then taken it was ratified by the people of the forty-four counties first named, and by those of Pendleton, Hardy, Hampshire, and Morgan. But no one of the counties of Berkeley, Jefferson, or Frederick, apparently, voted on the matter; owing, as was said by the defendant's counsel at the bar, to the fact, "that, from the 1st of June, 1861, to the 1st of March, 1862, during which time these proceedings for the formation of a new State were held, those counties were in the possession, and under the absolute control, of the forces of the Confederate States; and that an attempt to hold meetings in them to promote the formation of the new State would have been followd by immediate arrest and imprisonment."

All this being done, the legislature of Virginia, as reorganized, passed, on the 13th May, 1862, an act, in title and body, thus:

An Act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State.

§ 1. *Be it enacted by the General Assembly,* That the consent of the legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, within the jurisdiction of this State, to include the counties of Hancock, &c. [forty-eight counties being named (being the forty-four first mentioned, with Pendleton, Hardy, Hampshire, and Morgan), but the counties of Berkeley, Jefferson, or Frederick, not being included], *according*
*43 *ing to the boundaries and under the provisions set * forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November,* 1861.

§ 2. That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of *Berkeley, Jefferson,* and *Frederick,* shall be included in and form part of the State of West Virginia WHENEVER the voters of said counties shall ratify and assent to the said constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

§ 3. That this act shall be transmitted by the Executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of *West Virginia* into the Union.

§ 4. This act shall be in force from and after its passage.

Under this act, no elections apparently were held; and on the 31st December, 1862,[1] Congress passed

An Act for the admission of the State of "West Virginia" into the Union, and for other purposes.

Whereas, The people inhabiting that portion of Virginia known as West Virginia, did by a convention assembled in the city of Wheeling, on the 26th November, 1861, frame for themselves a constitution with a view of becoming a separate and independent State; *and whereas,* at a general election held in the counties composing the territory aforesaid, on the 3d of May last, the said constitution was approved and adopted by the qualified voters of the proposed State; *and whereas,* the legislature of Virginia, by an act passed on the 13th day of May, 1862, did give its consent to the formation of a new State within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia, and to embrace the following named counties, to wit [the forty-eight counties mentioned in the above-quoted Virginia act of May 13, 1862, were here set forth by name, and not including Berkeley or Jefferson]; *and whereas,*
*44 both the convention * and the legislature aforesaid have requested that the new State should be admitted into the Union, and the constitution aforesaid being republican in form, Congress doth hereby consent that the *said forty-eight counties* may be formed into a separate and independent State; therefore,

Be it enacted, &c., That the State of West Virginia be, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatsoever, &c.

[1] 12 Stat. at Large, 633.

The act contained a proviso that it should not take effect until after the proclamation of the President of the United States, hereinafter provided for. It then proceeded to recite that it was represented to Congress that since the convention of 26th November, 1861, which framed and proposed the constitution for the said State of West Virginia, the people thereof had expressed a wish to change the 7th section of the 11th article of said constitution, by striking out the same, and inserting the following in its place. The article [on the subject of slavery] was then set forth. It was therefore further enacted that whenever the people of West Virginia should, through their said convention, and by a vote to be taken, &c., make and ratify the change aforesaid, and properly certify the same under the hand of the president of the convention, it should be lawful for the President of the United States to issue his proclamation stating the fact, and that thereupon this act should take effect, and be in force from and after sixty days from the date of the proclamation.

This proclamation President Lincoln did issue on the 20th April, 1863,[1] reciting the act, with, however, a condition annexed; reciting that proof of compliance with the condition, as required by the second section of the act, had been submitted to him, and in pursuance of the act declaring and proclaiming that the act should take effect, and be in force from and after sixty days from his proclamation.

*45 Next in the history came certain acts of the State of Virginia; * among them one passed January 31, 1863, and which, with its title, ran thus:

An Act giving the consent of the State of Virginia to the County of Berkeley being admitted into, and becoming part of, the State of West Virginia.

Whereas, By the constitution for the State of West Virginia, ratified by the people thereof, it is provided that additional territory may be admitted into and become part of said State, with the consent of the legislature thereof, and it is represented to the General Assembly that the people of the county of *Berkeley* are desirous that said county should be admitted into and become part of the said State of West Virginia: Now, therefore,

1. *Be it enacted by the General Assembly,* That polls shall be opened and held on the fourth Thursday of May next, at the several places for holding elections in the county of Berkeley, for the purpose of taking the sense of the qualified voters of said county on the question of including said county in the State of West Virginia.

2. The poll-books shall be headed as follows, viz.: *"Shall the county of Berkeley become a part of the State of West Virginia?"* and shall contain two columns, one headed *"Aye,"* and the other *"No,"* and the names of those who vote in favor of said county becoming a part of the State of West Virginia shall be entered in the first column, and the names of those who vote against it shall be entered in the second column.

3. The said polls shall be superintended and conducted according to the laws regulating general elections, and the commissioners superintending the same at the court-house of the said county shall, within six days from the commencement of the said vote, examine and compare the several polls taken in the county, strike therefrom any votes which are by law directed to be stricken from

[1] 13 Stat. at Large, 731.

the same, and attach to the polls a list of the votes stricken therefrom, and the reasons for so doing. The result of the polls shall then be ascertained, declared, and certified as follows: The said commissioners shall make out two returns in the following form, or to the following effect:

"We, commissioners for taking the vote of the qualified voters of Berkeley County on the question of including the said county in the State of West Virginia, do hereby certify that polls for that purpose were opened and held the fourth Thursday of May, in the
*46 year 1863, within said county, pursuant * to law, and that the following is a true statement of the result as exhibited by the poll-books, viz.: for the county of Berkeley becoming part of the State of West Virginia, votes; and against it votes. Given under our hands this day of , 1863;"

which returns, written in words, not in figures, shall be signed by the commissioners; one of the said returns shall be filed in the clerk's office of the said county, and the other shall be sent, under the seal of the secretary of this commonwealth, within ten days from the commencement of the said vote, *and the governor of this State, if of opinion* that the said vote has been opened and held, and the result ascertained and certified pursuant to law, *shall certify the result of the same under the seal of this State, to the governor of the said State of West Virginia.*

4. If the governor of this State shall be of opinion that the said polls cannot be safely and properly opened and held in the said county of Berkeley, on the fourth Thursday of May next, he may by proclamation postpone the same, and appoint in the same proclamation, or by one to be hereafter issued, another day for opening and holding the same.

5. If a majority of the votes given at the polls opened and held pursuant to this act be in favor of the said county of Berkeley becoming part of the State of West Virginia, then shall the said county become part of the State of West Virginia when admitted into the same with the consent of the legislature thereof.

6. This act shall be in force from its passage.

Then followed, four days later, on the 4th of February of the same year, 1863, an act relating to the admission of several other counties, including *Jefferson,* thus:

An Act giving consent to the admission of certain counties into the new State of West Virginia upon certain conditions.

1. *Be it enacted by the General Assembly of Virginia,* That at the general election on the fourth Thursday of May, 1863, it shall be lawful for the voters of the district composed of the counties of Tazewell, Bland, Giles, and Craig to declare, by their votes, whether said counties shall be annexed to, and become a part of, the new State of West Virginia; also, at the same time, the district composed of the counties of Buchanan, Wise, Russell, Scott, and Lee, to de-
*47 clare, by their votes, whether the counties * of the said last-named district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Alleghany, Bath, and Highland, to declare, by their votes, whether the counties of such last-named district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Frederick and *Jefferson,* or *either* of them, to declare by their votes whether the counties of the said last-named

district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Clarke, Loudoun, Fairfax, Alexandria, and Prince William, to declare, by their votes, whether the counties of the said last-named district shall be annexed to, and become a part of, the State of West Virginia; also, at the same time, the district composed of the counties of Shenandoah, Warren, Page, and Rockingham, to declare, by their votes, whether the counties of the said last-named district shall be annexed to, and become a part of, the State of West Virginia; and for that purpose there shall be a poll opened at each place of voting in each of said districts, headed *"For annexation,"* and *"Against annexation."* And the consent of this General Assembly is hereby given for the annexation to the said State of West Virginia of such of said districts, or of either of them, as a majority of the votes so polled in each district may determine; provided that the legislature of the State of West Virginia shall also consent and agree to the said annexation, after which all jurisdiction of the State of Virginia over the districts so annexed shall cease.

2. It shall be the duty of the *governor of the Commonwealth to ascertain and certify the result as other elections are certified.*

3. In the event the state of the country will not permit, or from any cause, said election for annexation cannot be fairly held on the day aforesaid, it shall be the duty of the governor of this Commonwealth, as soon as such election can be safely and fairly held, and a full and free expression of the opinion of the people had thereon, to issue his proclamation ordering such election for the purpose aforesaid, and certify the result as aforesaid.

4. This act shall be in force from its passage.

*48 Under these two acts elections of some sort were held * and the governor certified the same to the State of West Virginia, and that State thereupon extended her jurisdiction over the counties of Berkeley and Jefferson, and still maintained it.

Next came an act of the State of Virginia, passed December 5th, 1865:

An act to repeal the second section of an act passed on the 13th day of May, 1862, entitled An act giving the consent of the legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State; also, repealing the act passed on the 31st day of January, 1863, entitled An act giving the consent of the State of Virginia to the county of Berkeley being admitted into, and becoming part of, the State of West Virginia; also, repealing the act passed on the 4th day of February, 1863, entitled An act giving consent to the admission of certain counties into the new State of West Virginia, upon certain conditions, and withdrawing consent to the transfer of jurisdiction over the several counties in each of said acts mentioned.

Whereas, It sufficiently appears that the conditions prescribed in the several acts of the General Assembly of the restored government of Virginia, intended to give consent to the transfer, from this State to the State of West Virginia, of jurisdiction over the counties of *Jefferson* and *Berkeley,* and the several other counties mentioned in the act of February 4th, 1863, hereinafter recited, have not been complied with; and the consent of Congress, as required by the Constitution of the United States, not having been obtained in order to give effect to such transfer, so that the proceedings heretofore had on this subject are simply inchoate, and said consent may properly be withdrawn; and this General As-

sembly, regarding the contemplated disintegration of the Commonwealth, even if within its constitutional competency, as liable to many objections of the gravest character, not only in respect to the counties of Jefferson and Berkeley, over which the State of West Virginia has prematurely attempted to exercise jurisdiction, but also as to the several other counties above referred to:

1. *Be it therefore enacted by the General Assembly of Virginia,* That the second section of the act passed on the 13th day of May, 1862, entitled An act giving the consent of the legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State be, and the same is hereby, repealed.

*49 * 2. That the act passed on the 31st day of January, 1863, entitled An act giving the consent of the State of Virginia to the county of Berkeley being admitted into and becoming part of the State of West Virginia, be, and the same is, in like manner, hereby repealed.

3. That the act passed February 4th, 1863, entitled An act giving consent to the admission of certain counties into the new State of West Virginia upon certain conditions, be, and the same is, in like manner, hereby repealed.

4. That all consent in any manner heretofore given, or intended to be given, by the General Assembly of Virginia to the transfer, from its jurisdiction to the jurisdiction of the State of West Virginia, of any of the counties mentioned in either of the above-recited acts, be, and the same is hereby, withdrawn; and all acts, ordinances, and resolutions heretofore passed purporting to give such consent are hereby repealed.

5. This act shall be in force from and after the passage thereof.

On the 10th of March, 1866,[1] Congress passed a

Joint Resolution giving the consent of Congress to the transfer of the Counties of Berkeley and Jefferson to the State of West Virginia.

Be it resolved, &c., That Congress hereby recognizes the transfer of the counties of Berkeley and Jefferson from the State of Virginia to West Virginia and consents thereto.

In this state of things, the Commonwealth of Virginia brought her bill in equity against the State of West Virginia in this court on the ground of its original jurisdiction of controversies between States under the Constitution, in which it was alleged that such a controversy had arisen between those States in regard to their boundary, and especially as to the question whether the counties of Berkeley and Jefferson had become part of the State of West Virginia or were part of and within the jurisdiction of the Commonwealth of Virginia; and the prayer of the bill was that it might be established by the decree of

*50 this court that those * counties were part of the Commonwealth of Virginia, and that the boundary line between the two States should be ascertained, established, and made certain, so as to include the counties mentioned as part of the territory and within the jurisdiction of the State of Virginia.

The stating part of the bill was largely composed of the substance of four

[1] 14 Stat. at Large, 350.

acts of the General Assembly of the Commonwealth, already presented at large, in the statement, copies of them being made exhibits and filed with the bill.

The bill, in addition to the substance of these statutes, alleged that no action whatever was had or taken under the second section of the act of 1862,[1] but that afterwards the State of West Virginia was admitted into the Union, under an act of Congress and proclamation of the President, without including either the counties of Berkeley, Jefferson, or Frederick.

It further alleged that an attempt was made to take the vote in the counties of Jefferson and Berkeley at the time mentioned in the acts of January 31st, and February 4th, 1863,[2] but that, owing to the state of the country at that time, no fair vote could be taken; that no polls were opened at any considerable number of the voting places; *that the vote taken was not a fair and full expression;* all of which was well known to the persons who procured the certificate of such election. It also alleged that it having been *falsely and fraudulently suggested, and falsely and untruly made to appear to the governor of the Commonwealth,* that a large majority of the votes was given in favor of annexation, he certified the same to the State of West Virginia, and that thereupon, without the consent of Congress, that State extended her jurisdiction over the said counties of Berkeley and Jefferson, and over the inhabitants thereof, and still maintained the same.

The State of Virginia, of course, in coming before this court with this case, relied upon that clause of the Federal Constitution which ordains that "no State shall, *without the assent of Congress,* enter into any agreement or
*51 compact with * any other State," and that one also which ordains that "the judicial power shall extend . . . to controversies between two or more States."

To the bill thus filed the State of West Virginia appeared and put in a general demurrer. It was not denied that West Virginia had from the beginning continued her assent to receive these two counties.

The case was elaborately argued at December Term, 1866, by *Messrs. B. R. Curtis and A. Hunter, in support of the bill, and by Messrs. B. Stanton and Reverdy Johnson, in support of the demurrer; and again at this term by Mr. Taylor, Attorney-General of Virginia, Messrs. B. R. Curtis, and A. Hunter, on the former side, and Messrs. B. Stanton, C. J. Faulkner, and Reverdy Johnson, contra.*

In support of the bill it was argued, among other things, that a State was incapable under the Constitution of making any contract with another State; that States might negotiate with each other, might express a mutual willingness to do the same thing, but that this was all; that Congress by the act of 1862, assenting to the admission of a State composed of but forty-eight counties, had not given its assent to a State having in it the counties of Berkeley and Jefferson; that Congress had never assented to the admission of those counties until its joint resolution of 1866; that previous to that time Virginia had withdrawn, as she had a right to do, her once offered assent to what Congress could alone complete; that the transfer could exist only by the concurrent assent of all these parties; that therefore no transfer had been made by the joint resolution. Even if this were not so, and if fair elections under the acts of 1863 would be suffi-

[1] *Supra,* p. 43.

[2] *Supra,* pp. 45, 47.

cient, the allegations of the bill as to the character of the elections relied on—allegations of partial and fraudulent elections—which allegations on a demurrer were to be taken as true—concluded the matter; for if *no* elections had ever taken place, then even the condition upon which as between the two States the counties were to pass to West Virginia, had never taken effect.

*52 * In support of the demurrer the principal points were, that although this court had jurisdiction over "controversies between two States," it was only over controversies in which some question in its nature judicial was involved. This court could not settle a controversy of arms or force, such as came near arising between Ohio and Michigan, on the matter of their boundary; nor would it, settle a political one. *Georgia* v. *Stanton*[1] decided that. Now, the main question here involved was the political jurisdiction over two counties, and their inhabitants. There was no land that Virginia claims as her individual land. The question then was a political question; one for Congress. Of the disputed questions of boundary which had arisen in this country, Congress had settled most.[2] In the few cases, where this court had acted, included the case of *Rhode Island* v. *Massachusetts,*[3] where there was an old colonial agreement of 1710, there had always been some proper subject of *judicial* action involved; a question of the specific performance of contract, a question of property, or the like. Even in the great English case of *Penn* v. *Lord Baltimore,* A. D. 1750,[4] before Lord Hardwicke, to settle the lines between Delaware and Maryland, there was an agreement for settling the boundary; a proper head of equitable jurisdiction. The dicta and much of the argument of Baldwin, J., who gave the opinion in the Rhode Island case, were unnecessary to the judgment. Other cases have followed that.

In reply to the other side it was contended that the boundary, as contemplated both by the State of Virginia and the proposed State, was not confined to the limits specifically stated, but was capable of being opened, to the extent provided for, by the two bodies; that this capacity was inherent in the State as constituted; that Congress in 1862 received the State with this capacity; that the right of voting was subsequently exercised by the two counties under the Virginia acts of 1863; that the condition thus became executed, and the two

*53 counties transferred to the State of West Virginia; * that the court could not go behind the official returns of the vote; and, finally, that the purpose of one of the clauses of the Constitution, relied on in the argument of the other side, was not to prevent the States from settling their own boundaries so far as merely affected their relations to each other, but to guard against the derangement of their Federal relations with the other States of the Union, and the Federal government, which might be injuriously affected if the contracting parties might act upon their boundaries at pleasure; and that in this case the boundary having been settled by themselves, between Virginia and the new body to which she was in 1862 assisting to give existence, Virginia could not subsequently revoke her assent against the wish of the other party.

Mr. Justice MILLER delivered the opinion of the court.

The first proposition on which counsel insist, in support of the demurrer is, that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question

[1] 6 Wallace, 50.

[2] 8 Stat. at Large, 751, title, Boundary, in Index.

[3] 12 Peters, 724.

[4] 1 Vesey, 444.

to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute.

This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well-considered cases have been decided. Without entering into the argument by which those decisions are supported, we shall content ourselves with showing what is the established doctrine of the court.

In the case of *Rhode Island* v. *Massachusetts,*[1] this question was raised, and Chief Justice Taney dissented from the judgment of the court by which the jurisdiction was affirmed, on the precise ground taken here. The subject
*54 is elaborately discussed in the opinion of the court, delivered * by Mr. Justice Baldwin, and the jurisdiction, we think, satisfactorily sustained. That case, in all important features, was like this. It involved a question of boundary and of the jurisdiction of the States over the territory and people of the disputed region. The bill of Rhode Island denied that she had ever consented to a line run by certain commissioners. The plea of Massachusetts averred that she had consented. A question of fraudulent representation in obtaining certain action of the State of Rhode Island was also made in the pleadings.

It is said in that opinion that, "title, jurisdiction, sovereignty, are (therefore) dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it, so that great as questions of jurisdiction and sovereignty may be, they depend on facts." And it is held that as the court has jurisdiction of the question of boundary, the fact that its decision on that subject settles the territorial limits of the jurisdiction of the States, does not defeat the jurisdiction of the court.

The next reported case, is that of *Missouri* v. *Iowa,*[2] in which the complaint is, that the State of Missouri is unjustly ousted of her jurisdiction, and obstructed from governing a part of her territory on her northern boundary, about ten miles wide, by the State of Iowa, which exercises such jurisdiction, contrary to the rights of the State of Missouri, and in defiance of her authority. Although the jurisdictional question is thus broadly stated, no objection on this point was raised, and the opinion which settled the line in dispute, delivered by Judge Catron, declares that it was the unanimous opinion of all the judges of the court. The Chief Justice must, therefore, have abandoned his dissenting doctrine in the previous case.

That this is so is made still more clear by the opinion of the court delivered by himself in the case of *Florida* v. *Georgia*[3] in which he says that "it is settled, by repeated decisions, that a question of boundary between States,
*55 is * within the jurisdiction conferred by the Constitution on this court."

A subsequent expression in that opinion shows that he understood this as including the political question, for he says "that a question of boundary between States is necessarily a political question to be settled by compact made by the political departments of the government. . . . But under our form of government a boundary between two States may become a judicial question to be decided by this court."

[1] 12 Peters, 724.

[2] 7 Howard, 660.

[3] 17 Id. 487.

In the subsequent case of *Alabama* v. *Georgia*,[1] all the judges concurred, and no question of the jurisdiction was raised.

We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding.

In the further consideration of the question raised by the demurrer we shall proceed upon the ground, which we shall not stop to defend, that the right of West Virginia to jurisdiction over the counties in question, can only be maintained by a valid agreement between the two States on that subject, and that to the validity of such an agreement, the consent of Congress is essential. And we do not deem it necessary in this discussion to inquire whether such an agreement may possess a certain binding force between the States that are parties to it, for any purpose, before such consent is obtained.

As there seems to be no question, then, that the State of West Virginia, from the time she first proposed, in the constitution under which she became
*56 a State, to receive these * counties, has ever since adhered to, and continued her assent to that proposition, three questions remain to be considered.

1. Did the State of Virginia ever give a consent to this proposition which became obligatory on her?

2. Did the Congress give such consent as rendered the agreement valid?

3. If both these are answered affirmatively, it may be necessary to inquire whether the circumstances alleged in this bill, authorized Virginia to withdraw her consent, and justify us in setting aside the contract, and restoring the two counties to that State.

To determine these questions it will be necessary to examine into the history of the creation of the State of West Virginia, so far as this is to be learned from legislation, of which we can take judicial notice.

The first step in this matter was taken by the organic convention of the State of Virginia, which in 1861 reorganized that State, and formed for it what was known as the Pierpont government—an organization which was recognized by the President and by Congress as the State of Virginia, and which passed the four statutes set forth as exhibits in the bill of complainant. This convention passed an ordinance, August 30, 1861, calling a convention of delegates from certain designated counties of the State of Virginia to form a constitution for a new State to be called Kanawha.

The third section of that ordinance provides that the convention when assembled may change the boundaries of the new State as described in the first section, so as to include the "counties of Greenbrier and Pocahontas, or either of them, and also the counties of Hampshire, Hardy, Morgan, Berkeley, and Jefferson, or either of them," if the said counties, or either of them, shall declare their wish, by a majority of votes given, and shall elect delegates to the said convention.

[1] 23 Howard, 505.

It is thus seen that in the very first step to organize the new State, the old State of Virginia recognized the peculiar condition of the two counties now in question, and provided that either of them should become part of the new
*57 State upon the * majority of the votes polled being found to be in favor of that proposition.

The convention authorized by this ordinance assembled in Wheeling, November 26, 1861. It does not appear that either Berkeley or Jefferson was represented, but it framed a constitution which, after naming the counties composing the new State in the first section of the first article, provided, by the second section, that if a majority of the votes cast at an election to be held for that purpose in the district composed of the counties of Berkeley, Jefferson, and Frederick, should be in favor of adopting the constitution, they should form a part of the State of West Virginia. That constitution also provided for representation of these counties in the Senate and House of Delegates if they elected to become a part of the new State, and that they should in that event constitute the eleventh judicial district. A distinct section also declares, in general terms, that additional territory may be admitted into and become part of the State with the consent of the legislature.

The schedule of this constitution arranged for its submission to a vote of the people on the first Thursday in April, 1862.

This vote was taken and the constitution ratified by the people; but it does not appear that either of the three counties of Jefferson, Berkeley, and Frederick, took any vote at that time.

Next in order of this legislative history is the act of the Virginia legislature of May 13, 1862, passed shortly after the vote above mentioned had been taken.[1] This act gives the consent of the State of Virginia to the formation of the State of West Virginia out of certain counties named under the provisions set forth in its constitution, and by its second section it is declared that the consent of the legislature of Virginia is also given that the counties of Berkeley, Jefferson, and Frederick, shall be included in said State "*whenever* the voters of said counties shall ratify and assent to said constitution,
*58 * at an election held for that purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe."

This act was directed to be sent to the senators and representatives of Virginia in Congress, with instructions to obtain the consent of Congress to the admission of the State of West Virginia into the Union.

Accordingly on the 31st of December, 1862, Congress acted on these matters, and reciting the proceedings of the Convention of West Virginia, and that both that convention and the legislature of the State of Virginia had requested that the new State should be admitted into the Union, it passed an act for the admission of said State, with certain provisions not material to our purpose.

Let us pause a moment and consider what is the fair and reasonable inference to be drawn from the actions of the State of Virginia, the Convention of West Virginia, and the Congress of the United States in regard to these counties.

The State of Virginia, in the ordinance which originated the formation of

[1] *Supra, p,* 42.

the new State, recognized something peculiar in the condition of these two counties, and some others. It gave them the option of sending delegates to the constitutional convention, and gave that convention the option to receive them. For some reason not developed in the legislative history of the matter these counties took no action on the subject. The convention, willing to accept them, and hoping they might still express their wish to come in, made provision in the new constitution that they might do so, and for their place in the legislative bodies, and in the judicial system, and inserted a general proposition for accession of territory to the new State. The State of Virginia, in expressing her satisfaction with the new State and its constitution, and her consent to its formation, by a special section, refers again to the counties of Berkeley, Jefferson, and Frederick, and enacts that whenever they shall, by a majority vote, assent to the constitution of the new State, they may become part thereof; and the legislature sends this statute to Congress with a request that it will admit the new

*59 * State into the Union. Now, we have here, on two different occasions, the emphatic legislative proposition of Virginia that these counties might become part of West Virginia; and we have the constitution of West Virginia agreeing to accept them and providing for their place in the new-born State. There was one condition, however, imposed by Virginia to her parting with them, and one condition made by West Virginia to her receiving them, and that was the same, namely, the assent of the majority of the votes of the counties to the transfer.

It seems to us that here was an agreement between the old State and the new that these counties should become part of the latter, subject to that condition alone. Up to this time no vote had been taken in these counties; probably none could be taken under any but a hostile government. At all events, the bill alleges that none was taken on the proposition of May, 1862, of the Virginia legislature. If an agreement means the mutual consent of the parties to a given proposition, this was an agreement between these States for the transfer of these counties on the condition named. The condition was one which could be ascertained or carried out at any time; and this was clearly the idea of Virginia when she declared that *whenever* the voters of said counties should ratify and consent to the constitution they should become part of the State; and her subsequent legislation making special provision for taking the vote on this subject, as shown by the acts of January 31st and February 4th, 1863, is in perfect accord with this idea, and shows her good faith in carrying into effect the agreement.

2. But did Congress consent to this agreement?

Unless it can be shown that the consent of Congress, under that clause of the Constitution which forbids agreements between States without it, can only be given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement.

*60 * The attention of Congress was called to the subject by the very short statute of the State of Virginia requesting the admission of the new State into the Union, consisting of but three sections,[1] one of which was entirely devoted to giving consent that these two counties and the county of Frederick might accompany the others, if they desired to do so. The constitution of the new State

[1] *Supra, p.* 42.

was literally cumbered with the various provisions for receiving these counties if they chose to come, and in two or three forms express consent is there given to this addition to the State. The subject of the relation of these counties to the others, as set forth in the ordinance for calling the convention, in the constitution framed by that convention, and in the act of the Virginia legislature, must have received the attentive consideration of Congress. To hold otherwise is to suppose that the act for the admission of the new State passed without any due or serious consideration. But the substance of this act clearly repels any such inference; for it is seen that the constitution of the new State was, in one particular at least, unacceptable to Congress, and the act only admits the State into the Union when that feature shall be changed by the popular vote. If any other part of the constitution had failed to meet the approbation of Congress, especially so important a part as the proposition for a future change of boundary between the new and the old State, it is reasonable to suppose that its dissent would have been expressed in some shape, especially as the refusal to permit those counties to attach themselves to the new State would not have endangered its formation and admission without them.

It is, therefore, an inference clear and satisfactory that Congress by that statute, intended to consent to the admission of the State with the contingent boundaries provided for in its constitution and in the statute of Virginia, which prayed for its admission on those terms, and that in so doing it necessarily consented to the agreement of those States on that subject.

*61 * There was then a valid agreement between the two States consented to by Congress, which agreement made the accession of these counties dependent on the result of a popular vote in favor of that proposition.

3. But the Commonwealth of Virginia insists that no such vote was ever given; and we must inquire whether the facts alleged in the bill are such as to require an issue to be made on that question by the answer of the defendant.

The bill alleges the failure of the counties to take any action under the act of May, 1862, and that on the 31st of January and the 4th of February thereafter the two other acts we have mentioned were passed to enable such vote to be taken. These statutes provide very minutely for the taking of this vote under the authority of the State of Virginia; and, among other things, it is enacted that the governor shall ascertain the result, and, if he shall be of opinion that said vote has been opened and held and the result ascertained and certified pursuant to law, he shall certify that result under the seal of the State to the governor of West Virginia; and if a majority of the votes given at the polls were in favor of the proposition, then the counties became part of said State. He was also authorized to postpone the time of voting if he should be of opinion that a fair vote could not be taken on the day mentioned in these acts.

Though this language is taken mainly from the statute which refers to Berkeley County, we consider the legal effect of the other statute to be the same.

These statutes were in no way essential to evidence the consent of Virginia to the original agreement, but were intended by her legislature to provide the means of ascertaining the wishes of the voters of these counties, that being the condition of the agreement on which the transfer of the counties depended.

The State thus showed her good faith to that agreement, and undertook in her own way and by her own officers to ascertain the fact in question.

*62 * The legislature might have required the vote to have been reported to it, and assumed the duty of ascertaining and making known the result to West Virginia; but it delegated that power to the governor. It invested him with full discretion as to the time when the vote should be taken, and made his opinion and his decision conclusive as to the result. The vote was taken under these statutes, and certified to the governor. He was of opinion that the result was in favor of the transfer. He certified this fact under the seal of the State to the State of West Virginia and the legislature of that State immediately assumed jurisdiction over the two counties, provided for their admission, and they have been a part of that State ever since.

Do the allegations of the bill authorize us to go behind all this and inquire as to what took place at this voting? To inquire how many votes were actually cast? How many of the men who had once been voters in these counties were then in the rebel army? Or had been there and were thus disfranchised? For all these and many more embarrassing questions must arise if the defendant is required to take issue on the allegations of the bill on this subject.

These allegations are indefinite and vague in this regard. It is charged that no fair vote was taken; but no act of unfairness is alleged. That no opportunity was afforded for a fair vote. That the governor was misled and deceived by the fraud of those who made him believe so. This is the substance of what is alleged. No one is charged specifically with the fraud. No particular act of fraud is stated. The governor is impliedly said to have acted in good faith. No charge of any kind of moral or legal wrong is made against the defendant, the State of West Virginia.

But, waiving these defects in the bill, we are of opinion that the action of the governor is conclusive of the vote as between the States of Virginia and West Virginia. He was in legal effect the State of Virginia in this matter. In addition to his position as executive head of the State, the legislature delegated to him all its own power in the premises. It vested him with large control *63 as to the time of taking the * vote, and it made his *opinion* of the result the condition of final action. It rested of its own accord the whole question on his judgment and in his hands. In a matter where that action was to be the foundation on which another sovereign State was to act—a matter which involved the delicate question of permanent boundary between the States and jurisdiction over a large population—a matter in which she took into her own hands the ascertainment of the fact on which these important propositions were by contract made to depend, she must be bound by what she has done. She can have no right, years after all this has been settled, to come into a court of chancery to charge that her own conduct has been a wrong and a fraud; that her own subordinate agents have misled her governor, and that her solemn act transferring these counties shall be set aside, against the will of the State of West Virginia, and without consulting the wishes of the people of those counties.

This view of the subject renders it unnecessary to inquire into the effect of the act of 1865 withdrawing the consent of the State of Virginia, or the act of Congress of 1866 giving consent, after the attempt of that State to withdraw hers.

The demurrer to the bill is therefore sustained, and the

BILL MUST BE DISMISSED.

Mr. Justice DAVIS, with whom concurred CLIFFORD and FIELD, JJ., dissenting.

Being unable to agree with the majority of the court in its judgment in this case, I will briefly state the grounds of my dissent.

There is no difference of opinion between us in relation to the construction of the provision of the Constitution which affects the question at issue. We all agree that until the consent of Congress is given, there can be no valid compact or agreement between States. And that, although the point of time when Congress may give its consent is not material, yet, when it is given, there must be a reciprocal and concurrent consent of the three parties to the contract. Without * this, it is not a completed compact. If, therefore, Virginia withdrew its assent before the consent of Congress was given, there was no compact within the meaning of the Constitution.

*64

To my mind nothing is clearer, than that Congress never did undertake to give its consent to the transfer of Berkeley and Jefferson counties to the State of West Virginia until March 2, 1866. If so, the consent came too late, because the legislature of Virginia had, on the fifth day of December, 1865, withdrawn its assent to the proposed cession of these two counties. This withdrawal was in ample time, as it was before the proposal of the State had become operative as a concluded compact, and the bill (in my judgment) shows that Virginia had sufficient reasons for recalling its proposition to part with the territory embraced within these counties.

But, it is maintained in the opinion of the court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia, when it admitted West Virginia into the Union. The argument of the opinion is, that Congress, by admitting the new State, gave its assent to that provision of the new constitution which looked to the acquisition of these counties, and that if the people of these counties have *since* voted to become part of the State of West Virginia, this action is within the consent of Congress. I most respectfully submit that the facts of the case (about which there is no dispute), do not justify the argument which is attempted to be drawn from them.

The second section of the first article of the constitution of West Virginia was merely a proposal addressed to the people of two distinct districts, on which they were invited to act. The people of one district (Pendleton, Hardy, Hampshire, and Morgan) accepted the proposal. The people of the other district (Jefferson, Berkeley, and Frederick) rejected it.

In this state of things, the first district became a part of the new State, so far as its constitution could make it so, and the legislature of Virginia included it in its assent, and * Congress included it in its admission to the Union. But neither the constitution of West Virginia, nor the assent of the legislature of Virginia, nor the consent of Congress, had any application whatever to the second district. For though the second section of the first article of the new constitution had proposed to include it, the proposal was accompanied with conditions which were not complied with; and when that constitution was presented to Congress for approval, the proposal had already been rejected, and had no significance or effect whatever.

*65

State of Missouri v. State of Kentucky.

Supreme Court of the United States, 1870.

[11 *Wallace*, 395.]

1. On a question of the exact ancient course of a river in a wild region of our country, maps made by early explorers being but hearsay evidence, so far as they relate to facts within the memory of witnesses—*ex. gr.* since A. D. 1800—are not to control the regularly given testimony of such persons.
2. It seems that the old maps (those *ex. gr.* prior to A. D. 1800), indicative of the physics and hydraulics of the Mississippi, are not greatly to be relied on.
3. Wolf Island, in the Mississippi River, about twenty miles below the mouth of the Ohio, is part of the State of Kentucky, and not part of the State of Missouri. This fact settled by the testimony of witnesses as to which State exercised jurisdiction; as to where the middle of the main channel of the Mississippi River had been when the boundary between the States was fixed; by the character of the soil and trees of the island, as compared with the soil and trees of Missouri and Kentucky respectively; and by the natural changes produced in the course of the current by the physics and hydraulics of the river since the time mentioned as generally and specifically shown.

The State of Missouri brought here, in February, 1859, her original bill against the State of Kentucky, the purpose of the bill being to ascertain and establish, by a decree of this court, the boundary between the two States at a point on the Mississippi River known as Wolf Island, which is about twenty miles below the mouth of the Ohio. The State of Missouri insisted that the island was a part of her territory, while the State of Kentucky asserted the contrary. The bill alleged that both States were bounded at that point by the
*396 main channel of the river, and that the island, at the * time the boundaries were fixed, was and is on the Missouri side of said channel.

The answer stated that Kentucky, formed out of territory originally embraced within the State of Virginia, was admitted into the Union on the 1st day of June, 1792, and that she had always claimed her boundary on the Mississippi to the middle of the river, and Wolf Island to be within her jurisdiction and limits as derived from Virginia; a part of Hickman County, one of the counties of Kentucky, opposite to which it lay. And it denied that the island belonged to Missouri, or that the main channel was on the eastern side of it when the boundaries of the States were fixed.

An immense amount of testimony, derived from maps as ancient as the earliest well-known navigation of the river; from the journals of ancient and later travellers; from official and *quasi* official surveys, &c., was introduced by the counsel of both sides, but more especially by those of Missouri, to show where the main channel had been and was—whether on the east or on the west of the island—in 1763, where the boundary between France and England, then owners respectively of the regions now known as Missouri and Kentucky, and more particularly where it was in 1783, when by our treaty of peace with Great Britain we succeeded to the rights of that government; and also where it was in 1820, when Missouri, part of the territory acquired from France, was admitted into the Union; the middle of the main channel of the river, confessedly, having been fixed in all these cases as the boundary. The depositions of many

witnesses on both sides, particularly on the defendant's, were also read, testifying as to where within the memory of man the channel in dispute had been.

The witnesses of the complainant—to give the case of Missouri more particularly—stated that from the present time back to 1830 the main channel of the river was on the east side of the island, and that from 1830 as far back as 1794, both channels were navigable. They admitted that, from 1832 to the present time, the eastern channel had been chiefly used for navigation.

*397 * The early maps and charts of the river, introduced by the State of Missouri, laid down the island as nearly in the middle of the river, but the larger portion of it west of the middle line. Amongst these were the map of Lieutenant Ross, of the British army, made in 1765, in an expedition from Fort Chartres to New Orleans; the map of Captain Philip Pittman, published in London in 1770; the map of General Collot, in 1796; Hutchins's map, in 1778; and Luke Munsell's map of Kentucky, made in 1818.

Extracts from the books of early travellers stated their passage down the river on the east side; among these books were the travels of Ashe in 1806, and of Sir Francis Baily in 1796.

The Pittsburg Navigator, in several editions from 1806 to 1818, was relied on, stating the channel to be on both sides, but best on the east side.

Reliance was had, too, on certain official or *quasi* official maps of the Federal government. An official map, made in 1821, by the United States Engineers' Department, under an act of Congress of April 14, 1820, and a United States Survey and Report, made in 1838, by the Land Department, with official computation, showed the area of the cross section of the east channel to be 31,020.33 feet, and of the west channel to be 18,625.71, and the mean velocity of the east channel to be 3.72 feet per second, and of the west channel to be 2.79 feet, and giving the gallons discharged by the east channel per second as 115,395, and of the west channel 51,965, being less than one-half on the west side; and also the greatest depth of water on the east side as being 23 feet against 22½. General Barnard's apparently official map of 1821 was relied on as laying down the channel on the east side; as also the United States Coast Survey map, of 1864, presenting it in the same way. The island, it seemed, had been surveyed by the United States, in March, 1821, as part of Missouri; and in April, 1823, steps were taken to locate on it a New Madrid certificate for 600 arpents; and in August, 1834, a plot of the island was sent to the Register of the Land Office, at Jackson, Missouri.

*398 The State of Missouri relied, also, a good deal on the fact, * which seemed to have been sufficiently proven, that in 1820 the sheriff of New Madrid County (the county in Missouri opposite to the island), had executed process of the Missouri courts on the island against the only settler on it, one Hunter, and who entered upon it prior to 1803; and that one of the Missouri Circuit Court judges had once—though when did not appear—resided on the island.

Evidence introduced by Missouri tended to show that the first *clear* act of jurisdiction exercised by Kentucky was not earlier than 1826; and that it was only in 1837, when her legislature passed an act for the sale of lands on the island, and her people purchased under her title so offered, that Kentucky asserted open and exclusive ownership of the island.

The State of Kentucky on its side gave proof, which was much of it in direct opposition to that presented by Missouri. It proved that land on the island was entered in the Virginia land office during the Revolutionary war; the State now known as Kentucky being then part of Virginia; and that in 1828, one of the courts of Kentucky exercised jurisdiction over the island in a matter of apprenticeship. Although it presented fewer evidences from ancient maps and books of travels than did the State of Missouri, it produced more living persons whose recollections came in support of its case. More than a score of witnesses, many of them ancient, including boatmen, navigators, and several persons who had lived from childhood close by the island, some opposite to it, and specially interested by their business to note on which side vessels sailed, all testified that while now the main channel of the river was to be regarded as on the *east* side of the island, it was undoubtedly and within their memory and knowledge not so formerly, but was on the west side; many of these witnesses going into details, and showing a positive and experimental knowledge on the subject upon which they spoke; details of a sort that could not easily be invented, and which if not invented but true, tended to give the case to Kentucky.

The geology of the island and its *sylva* were relied on by
*399 * Kentucky, and shown to be more coincident with its own soil and woods than with those of Missouri; the argument hence being that what was now an island, was originally part of the mainland of Kentucky.

The counsel for Kentucky directed evidence yet more specially, to the physical changes which the shores of the two States had undergone since the years 1763, 1783, and 1820. It was not denied by them, that now and since 1820, the river on the east side of the island had become broad, deep, and navigable; the testimony introduced by them being directed to show that this was the result of physical and hydraulic causes, working changes since the boundary had been fixed; some of the changes being the results of actual efforts of science to improve the channel, but others, immeasurably more operative, natural ones only; a continuation of those changes caused in the basin of the Mississippi, by the mighty rises to which the river is subject; estimated at such magnitude that men of science[1] have considered that the river poured past even at this high point of it, at the rise in March, 1858, 1,130,000 cubic feet per second; at the rise in April of that year 1,260,000, and at the rise in the following June (continuing for several days), the immense volume of 1,475,000 of cubic feet per second; inundating cities, changing courses of the stream, and in former ages leaving far to the west of the present river-course those crescent-shaped lakes, noted by Sir Charles Lyell and other geologists, plainly bends in the ancient channel.[2]

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[1] See the report of Captain Humphreys and Lieutenant Abbott, of the Topographical Engineers of the United States, upon the physics and hydraulics of the Mississippi River, made by order of Congress.

[2] See Lyell's Second Visit to the United States, vol. ii, pp. 248, 250. By way of illustrating the immense geological changes which the basin of the Mississippi has undergone in the course of time, a passage was quoted from Lyell's Principles of Geology (10th ed., vol. i, p. 462). The author in describing a cliff near the Gulf, which he examined in 1846, and which he says had been well described by Bartram, the botanist, sixty-nine years before; "a cliff continually undermined by the stream." He says:

"At the base of it, about forty feet above the level of the gulf, is buried a forest, with the stools and roots in their natural position, and composed of such trees as now live in the swamps of the Delta and alluvial plain. Above this buried forest the bluff rises to a height of about seventy-five feet, and affords a section of beds of river sand, including

*400 * These were causes, sufficient as the counsel of the State of Kentucky argued, to account for the change in the course of the channel; and the counsel produced a map known as H. G. Black's (see it *infra,* p. 409), showing how the eastern channel had been produced by recent mighty rushings of the river against the "iron banks," above the island; and which while they were able to resist the current threw it with a rebound to the Missouri side, but which now yielding to the tremendous stream, and being gradually washed away, let the whole force of the river come in a more direct and easy course.

The statement, in more detail, of this great body of evidence, tending only to the establishment of facts, would serve no purpose of judicial science; and may be the more properly omitted by the reporter, since, in most of the details not already given, it is minutely presented by the learned justice who gives, after stating it, the opinion of the court as a result.

It was all systematically and clearly introduced for the party whom it was supposed to aid, by *Messrs. M. Blair* and *F. A. Dick, in behalf of the State of Missouri, complainant;* and by *Messrs. G. Davis and H. Stanbery, on the other side;* the arguments which, in view of the special nature of the case, were not limited as to time, and were made by those same gentlemen, having been elaborate and able.[1]

*401 * Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary, for the purposes of this suit, to consider whether, on general principles, the middle of the channel of a navigable river which divides coterminous States, is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain, and England, in February, 1763, stipulated that the middle of the River Mississippi should be the boundary between the British and French territories on the continent of North America. And this line, established by the only sovereign powers at the time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain of 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836.[2] And Kentucky succeeded, in 1792,[3] to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi River. It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If

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trunks of trees and pieces of drift-wood, and above the sand a brown clay. From the top of the cliff the ground slopes to a height of about two hundred feet above the sea. From this section we learn that there have been great movements and oscillations of level since the Mississippi began to form an alluvial plain and drift down timber into it, and to bury under sand and sediment ancient forests. When the trees were buried the ground was probably sinking, after which it must have been raised again, so as to allow the stream to cut through its old alluvium. The depth of this ancient fluviatile is seen to be no less than two hundred feet, without any signs of the bottom being reached."

[1] *Mr. Stanbery* also raised and argued fully the point of jurisdiction; the judgment in the already reported case of *Virginia* v. *West Virginia* (*supra,* 39), by which discussion on that subject would have been concluded, not having been as yet announced.

[2] 3 Stat. at Large, 545; 5 Id. p. 50. [3] Id 189.

the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner.[1]

That Virginia claimed the ownership of the island as early as 1782 is very certain, for at that date the arable land on it was entered in the proper office of Virginia as vacant land lying within the territorial limits of the State,
*402 although it * seems the entry was never surveyed or carried into a grant.

And that Kentucky is now, and has been for many years prior to the commencement of this suit, in the actual and exclusive possession of the island, exercising the rights of sovereignty over it, is beyond dispute. The island lies opposite to, and forms part of, Hickman County, one of the counties of the State, and the lands embraced in it were, in May, 1837, surveyed under authority, and have since then been sold and conveyed to the purchasers by the same authority. The people residing on it have paid taxes and exercised the elective franchise according to the laws of the State. In 1851, a resident of the island was elected to represent the county in the General Assembly, and served in that capacity. And as early as 1828, a minor living there with one Samuel Scott, was bound an apprentice to him by the proper court having jurisdiction of such subjects. This possession, fully established by acts like these, has never been disturbed. If Missouri has claimed the island to be within her boundaries, she has made no attempt to subject the people living there to her laws, or to require of them the performance of any duty belonging to the citizens of a State. Nor has there been any effort on her part to occupy the island, or to exercise jurisdiction over it. If there were proof that the island, by legislation, had been included in the limits of New Madrid County, then the service of a writ in 1820, on the solitary settler there, by the sheriff of the county, would be an exercise of sovereign power on the part of the State. But in the absence of this proof, there is nothing to connect the State with the transaction, or from which an inference can be drawn that the sheriff was authorized to go on the island with his process. And for the same reason, it is hard to see how the fact, conceding it to be true, that a person occupying the position of a circuit judge of Missouri, once lived on the island (when or how long we are not informed), tends to show that the State intended to take possession of it.

These things may prove that, in the opinion of the judge and sheriff,
*403 the island belonged to Missouri, but they do not * go further and put the State in any better position than she was, if they had not occurred. And so with the locator of the New Madrid claim in 1821. He doubtless believed he had authority to locate his warrant on the island, but surely the State cannot claim that she acquired any right by this proceeding. There is, therefore, nothing in this record which shows that Kentucky has not maintained, for a long course of years, exclusive possession and jurisdiction over this territory and the people who inhabit it. It remains to be seen whether she shall remain in possession and continue to exercise this jurisdiction, or whether she shall give way to Missouri. The case is certainly not without its difficulties, but we think these difficulties can be removed by a fair examination of the testimony, and the right of the contestants properly determined.

[1] Heffter, Du Droit International, p. 143, § 66; Caratheodéry, Du Droit International, 62.

The evidence to be considered consists of the testimony of living witnesses, the physical changes and indications at and above the island, and the maps and books produced by the complainant. In a controversy of this nature, where State pride is more or less involved, it is hardly to be expected that the witnesses would all agree in their testimony. And as this conflict does exist, it is necessary to consider the evidence somewhat in detail, in order to justify the conclusions we have reached concerning it.

There are eight witnesses called for the complainant, who testify confidently, that the main channel of the Mississippi River was always east of Wolf Island, and one of them (Swon), an experienced river-man, who navigated the river from 1821 to 1851, in all stages of water, says there are no indications that the main channel was ever on the west side. Only three of them knew the river prior to 1820, and they were engaged in the business of flat-boating, which is hardly ever undertaken in a low stage of water. There is nothing to show that any one of them ever made a personal examination of the channels and surrounding objects at this point, and there is a remarkable absence of facts to sustain their opinions. It is also noticeable, in connection with this evidence, that none of the witnesses (Hunter may be an exception) * ever lived in the vicinity of the island, or remained there any length of time, and that all the knowledge any of them acquired of the state of the river was obtained by passing up or down it at different times, either on flatboats or steamboats. Notwithstanding they swear positively that the channel was always east of the island, yet Watson says it changed for about three years, and Ranney testifies that on one occasion, when the main channel was divided into three parts, the deepest water for a short time in the fall of the year was found on the west side of the island, and steamboats passed on that side. But they do not prove a deficiency of water at any time in the Missouri channel, or that any boat, from that or any other cause, was ever hindered in any attempt to run it. It is undoubtedly true that the Kentucky channel, when the river was full, for many years has afforded a safe passage for boats, because at such a time, if the obstructions were not submerged they could be avoided, and navigators would take it as it was five miles the shortest. And passing the river only occasionally, and without any knowledge of where the volume of water flowed when the river was low, they would naturally conclude it was the main channel. It is equally true that now it is the main highway for the business of the river; but the point to be determined is, was it so as far back as 1763, or even 1820? If in the investigation of such an inquiry, positive certainty is not attainable, yet the evidence furnished by the defendant affords a reasonable solution of it. And, at any rate, it greatly outweighs the evidence on the other side, and in such a case the party in possession has the better right. The proof on behalf of the defendant consists of the testimony of twenty-seven witnesses. Many of them have been acquainted with the river from an early period in this century, and quite a number have spent their lives near the disputed territory, and, therefore, had better opportunities for observing the condition of the river at this point than the witnesses for the complainant, who only passed there occasionally. Nearly all of them are old men, and there is no
*404 *405 diversity of opinion between them concerning the location * of the main channel of the Mississippi River at Wolf Island. All who testify on the subject—there are only a few who do not—agree that until a comparatively recent

period it ran west of the island, and to fortify their opinions they describe the state of the respective channels at different times, and tell what was done by themselves or others about the navigation of the river. They concur in saying that in early times it was difficult for flatboats, even in the highest stage of water, to get into the Kentucky chute, owing to the current running towards the Missouri side, and that if they succeeded in doing it, the navigation was obstructed on account of the narrow and crooked condition of the stream, which was filled with tow-heads, sand-bars, driftwood, and rack-heaps. One of the witnesses, in describing the appearance of this chute in 1804, states that it looked like lowlands, with cottonwood and cypress on it, and that there was only a narrow channel close to the island; all the other space to the Kentucky shore, now open water, was then covered with large cottonwood timber.

Other witnesses corroborate this testimony, and unite in saying that in early times, at an ordinary stage of water, it was impossible to take the Kentucky channel at all, on account of these obstructions, while the Missouri channel was wide, deep, and unobstructed. And one of them expresses the opinion that in low water, any one could have got to the island from the Kentucky shore without wetting his feet, by crossing the small streams on the drift-wood. But we are not left to conjecture on this point, for Ramsey, an old inhabitant of the country, swears that on one occasion he walked over from the Kentucky side to the island, nearly all the way on dry land, and the residue on drift-wood, and noticed while on the island, that there was plenty of water in the Missouri channel.

Can it be possible that such a stream at this time was the main channel of the Mississippi River? Although the Kentucky channel, from natural causes, had improved in 1825, still in the low water of that year it did not have a depth
*406 of over two and a half feet nor a width exceeding one hundred * and fifty yards, while steamboats passed through the Missouri channel without any difficulty. The witness who testifies to this state of things, at that time, had his attention especially called to the subject as he kept a woodyard on the Kentucky side opposite the island, and missed the opportunity of supplying boats that ran the Missouri channel.

And there is no one who speaks of a scarcity of water in the Missouri channel, until after Captain Shreve operated in this locality with his snag-boats, which had the effect of opening and deepening the Kentucky channel, so that it has now become the navigable stream. Judge Underwood says that in 1820 the west channel was between four and five hundred yards wider than the east one, and must have discharged nearly double the quantity of water. And one witness testifies that the east channel was formerly so narrow that two steamers could not pass in it abreast. It would seem, therefore, that the condition of this channel, as told by these witnesses, was proof enough that the main channel was west of the island; but this is not all the proof on the subject. Russell, who was appointed superintendent of river improvements in 1842, and knew the island since 1814, and spent five months there in 1819, swears that in descending the river in 1830 or 1831 he sounded the Kentucky channel, and, not finding water enough in it by two or three feet to float his boat, was compelled to go down on the Missouri side, where there was nine or ten feet of water. To the same effect is the evidence of Holton, who, in 1828, being unable to get up the east channel with a steamer drawing upwards of six feet of water, went over to the Missouri side and passed through without any trouble. And, three

years later, Peebles saw three or four steamers attempt to run up the Kentucky channel, and failing to get through, back out and easily ascend the other. Christopher, who ran the river from 1824 to 1861, on one occasion could not pass the bar at the foot of the Kentucky chute with a boat drawing twelve feet of water, and was compelled to change to the other side, and got up without any difficulty; and there are other witnesses who testify to the inability of boats
*407 to * pass east of the island, and to their safe passage west of it. Indeed, the concurrent testimony of all the persons engaged in the navigation of the river is, that they could never safely go east of the island, unless in high water, and that they uniformly took the west channel in dry seasons; and the flatboatmen, in early times, even in high water, were frequently compelled to uncouple their boats in order to descend the Kentucky channel, and then were obliged to pull through by trees, on account of the narrowness of the channel. In low water they would quite often get aground and have to wait for a rise of the river to take them out. It will readily be seen that this class of men would naturally take risks in order to save five miles of navigation. Moseby, who has lived in the vicinity for forty-two years, testifies to the greater volume of water in the Missouri channel, and to boats usually taking it; and all the witnesses agree that since they knew the river the chutes around the island have undergone great changes, and that the east one is now, in depth, width, and freedom from obstructions, wholly unlike what it was formerly. In this state of proof, how can it be successfully contended that Missouri has any just claim to the island?

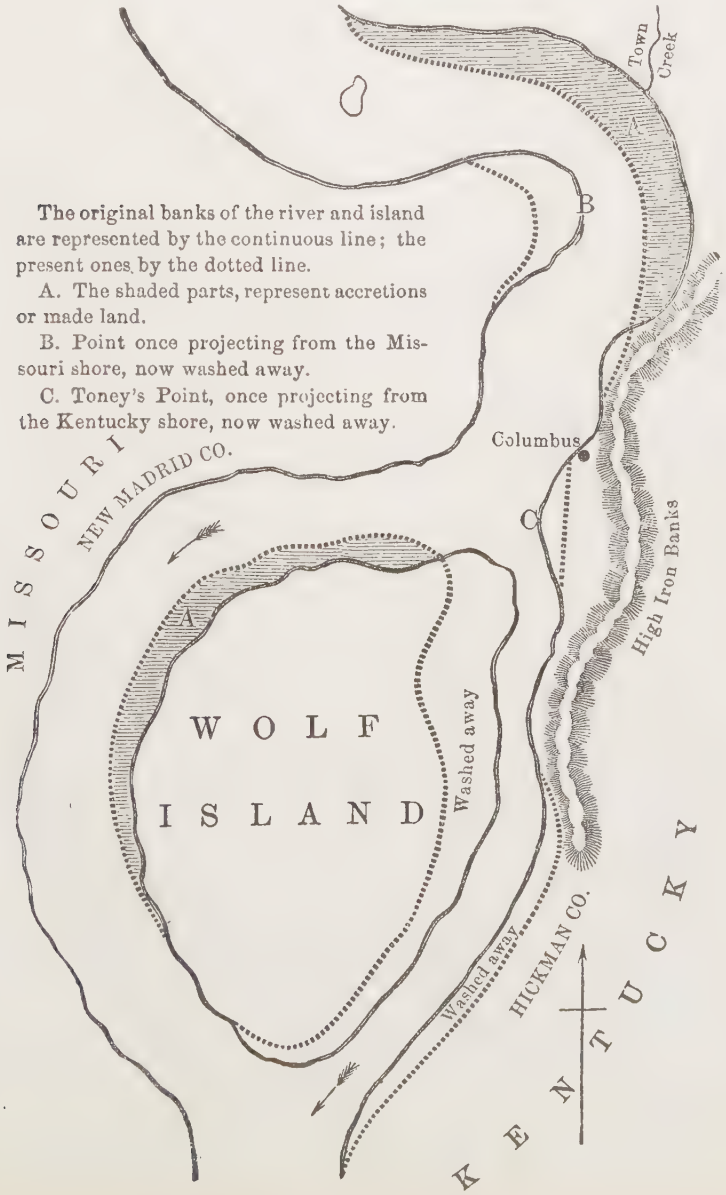
But there is additional proof growing out of certain physical facts connected with this locality which we will proceed to consider. Islands are formed in the Mississippi River by accretions produced by the deposit at a particular place of the soil and sand constantly floating in it, and by the river cutting a new channel through the mainland on one or the other of its shores. The inquiry naturally suggests itself, of which class is Wolf Island? If the latter, then the further inquiry, whether it was detached from Missouri or Kentucky. The evidence applicable to this subject tend strongly to show that the island is not the result of accretions, but was once a part of the mainland of Kentucky. Islands formed by accretions are, in river phraseology, called made land, while those produced by the other process necessarily are of primitive formation. It is easy to distinguish them on account of the difference in their soil and timber.
*408 * It has been found, by observation and experience, that primitive soil produces trees chiefly of the hard-wood varieties, while the timber growing on land of secondary formation—the effect of accretions—is principally cottonwood. Wolf Island is of large area, containing about fifteen thousand acres of land, and, with the exception of some narrow accretions on its shores, is primitive land, and has the primitive forest growing on it.

On the high land of the island there are the largest poplar, chincapin, oak, and black-jack trees growing, and primitive soil only has the constituent elements to produce such timber. But this is not all, for trees of like kind and size are found on the Kentucky side on what is called the second bottom, near the foot of the Iron Banks, which is about two feet higher than the bottom on which Columbus is located. There are no such trees on the Missouri shore. Those found there are of a different kind and much smaller growth. Besides this, the high land on the island is on the same level with the second bottom on the Kentucky side, while it is four or five feet higher than the land on the Missouri side opposite the island and above it. In this state of the case, it would

seem clear that this second bottom and island were once parts of the same table of land, and, at some remote period, were separated by the formation of the east channel. In the nature of things, it is impossible to tell when this occurred, nor is it necessary to decide that question, for, by the memory of living witnesses, we are enabled to determine that the east channel, or cut-off, as it should be called, was not the main channel down to 1820.

If the testimony already noticed be not enough to prove this, there is the additional evidence furnished by the changes which the river has accomplished in the neighborhood of the island, within the recollection of many intelligent persons. These changes are important, and are shown on the map of H. G. Black (on this page), which has proved to be a correct representation both of the

*409 *


The original banks of the river and island are represented by the continuous line; the present ones by the dotted line.
A. The shaded parts, represent accretions or made land.
B. Point once projecting from the Missouri shore, now washed away.
C. Toney's Point, once projecting from the Kentucky shore, now washed away.
Town Creek
B
Columbus
C
MISSOURI
NEW MADRID CO.
A
WOLF ISLAND
Washed away
High Iron Banks
Washed away
HICKMAN CO.
KENTUCKY

present and original position of the island, the river, and its banks. The ef-
*410 fect of the evidence on this subject is, that the filling * up at the mouth of Town Creek, the washing away of the point above on the Missouri side, the abrasion of the Iron Banks, and the partial destruction of Toney's Point, have operated to straighten the banks above the island on the Kentucky side, to bring the water closer to them, and, as a consequence, to cast it into the east channel. And that, before these projecting points were removed, and the accretions made at Town Creek, the water was thrown towards the Missouri side. This was necessarily so, as can readily be seen by an inspection of the map. In the original condition of the river the current must have been carried from the Missouri point to the Iron Banks opposite, and rebounded from them across to the Missouri side, so as to carry the channel west of Wolf Island. And it is equally clear that the changes which have occurred within this century have straightened the river and turned the channel to the east of the island. Can there be any need of further evidence to sustain the long-continued possession of Kentucky to the island, and are not the witnesses, who swear that in their time the main channel of the Mississippi River ran west of Wolf Island, abundantly fortified?

But it is said, the maps of the early explorers of the river and the reports of travellers, prove the channel always to have been east of the island. The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses, based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle, to dispossess a party of property on the mere statements—not sworn to—of travellers and explorers, when living witnesses, testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them?

But, it is claimed the books and maps which antedate human testimony, estab-
lish the right of Missouri to this island. If this be so, there is recent author-
*411 ity for saying they are * unreliable. In 1861 Captain Humphreys and Lieutenant Abbott, of the corps of Topographical Engineers, submitted to the proper bureau of the War Department, a report based on actual surveys and investigations, upon the physics and hydraulics of the Mississippi River, which they were directed to make by Congress. In speaking on the subject of the changes in the river,[1] they say: "These changes have been constantly going on since the settlement of the country, but the old maps and records are so defective, that it is impossible to determine much about those which occurred prior to 1800." In the face of this report, authorized by the government, and prepared with great learning and industry, how can we allow the books and maps published prior to this century, to have any weight in the decision of this controversy?

Without pursuing the investigation further, on full consideration of all the evidence in the case, we are satisfied the State of Missouri has no just claim to the possession of Wolf Island.

It is therefore ordered that the bill be

Dismissed.

[1] Page 104.

State of South Carolina v. State of Georgia, et al.

Supreme Court of the United States, 1876.

[93 *United States*, 4.]

1. The compact between South Carolina and Georgia, made in 1787, by which it was agreed that the boundary between the two States should be the northern branch or stream of the Savannah River, and that the navigation of the river along a specified channel should for ever be equally free to the citizens of both States, and exempt from hinderance, interruption, or molestation, attempted to be enforced by one State on the citizens of the other, has no effect upon the subsequent constitutional provision that Congress shall have power to regulate commerce with foreign nations and among the several States.
2. Congress has the same power over the Savannah River that it has over the other navigable waters of the United States.
3. The right to regulate commerce includes the right to regulate navigation, and hence to regulate and improve navigable rivers and ports on such rivers.
4. Congress has power to close one of several channels in a navigable stream, if, in its judgment, the navigation of the river will be thereby improved. It may declare that an actual obstruction is not, in the view of the law, an illegal one.
5. An appropriation for the improvement of a harbor on a navigable river, "to be expended under the direction of the Secretary of War," confers upon that officer the discretion
*5 to determine the mode of improvement, and * authorizes the diversion of the water from one channel into another, if in his judgment such is the best mode. By such diversion preference is not given to the ports of one State over those of another. *Quære,* Whether a State suing for the prevention of a nuisance in a navigable river, which is one of its boundaries, must not aver and show that she sustains some special and peculiar injury thereby, such as would enable a private person to maintain a similar action.

This is a bill in equity, filed in this court by the State of South Carolina, praying for an injunction restraining the State of Georgia, Alonzo Taft (Secretary of War), A. A. Humphries (chief of the corps of engineers United States army), Q. A. Gilmore (lieutenant-colonel of that corps), and their agents and subordinates, from "obstructing or interrupting" the navigation of the Savannah River, in violation of the compact entered into between the States of South Carolina and Georgia on the twenty-fourth day of April, 1787. The first and second articles of that compact are as follows:—

"Article 1. The most northern branch or stream of the river Savannah, from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence, the most northern branch or stream of the said river Tugoloo, till it intersects the northern boundary-line of South Carolina, if the said branch or stream extends so far north, reserving all the islands in the said rivers Tugoloo and Savannah to Georgia; but if the head spring or source of any branch or stream of the said river Tugoloo does not extend to the north boundary-line of South Carolina, then a west line to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugoloo River which extends to the highest northern latitude, shall, for ever hereafter, form the separation, limit, and boundary between the States of South Carolina and Georgia.

"ART. 2. The navigation of the river Savannah, at and from the bar and mouth, along the north-east side of Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of the said island, and from thence up the bed or principal stream of the said river to the confluence of the rivers Tugoloo and Keowee, and from the confluence up the channel of the most northern stream of Tugoloo River to its source, and back again by the same channel to the Atlantic Ocean, is hereby declared to be henceforth equally
*6 free to the citizens of * both States, and exempt from all duties, tolls, hinderance, interruption, or molestation whatsoever attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia."

Congress enacted June 23, 1874: "That the following sums of money be, and are hereby, appropriated to be paid out of any money in the treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, for the repair, preservation, and completion of the following public works hereinafter named."

"For continuing the improvement of the harbor of Savannah, $50,000." 18 Stat. 240.

The act of March 3, 1875 (18 id. 459), contains the following appropriation: "For the improvement of the harbor at Savannah, Ga., $70,000."

The work which the bill seeks to arrest is doing pursuant to the authority conferred by these acts.

The Savannah River, where it flows past the city of Savannah, is divided into two channels by Hutchinson's Island, which extends above and below the city, with a length of about six miles, and a width, where widest, of one mile or more. Of these channels, the more northerly is known as Back River, whilst that which passes immediately by the city of Savannah is called Front River.

The improvement consists in the construction of a crib dam at a point known as the "Cross Tides," for the purpose, by diverting a sufficient quantity of the water passing through the Back River into the Front River channel, of securing to the city a depth of fifteen feet at low water.

Mr. William Henry Trescot and *Mr. Philip Phillips* for the complainant.

1. The terms of the treaty of Beaufort are perpetual. Biordan & Duane, U. S. Laws, vol. i.; 1 Stat. So. Ca.; Wheaton's Int. Law, pt. 2, c. 2, sect. 268; Heffter, Droit Int, 170; *Chirac* v. *Chirac,* 2 Wheat, 259; Chappell's Historical Mis. of Georgia, pt. 2, 65; Bancroft, vol. viii. 137; vol. ix. 257; Articles of Confederation, Amer. Archives, vol. iv. 352-359.

*7 2. Georgia and South Carolina were competent to execute * that treaty. Articles of Confederation; *Harcourt* v. *Gaillard,* 12 Wheat. 523; *Spooner* v. *McConnell,* 1 McLean, 347; Journal American Congress, vol. iv.; 2 Stat. 57.

3. The adoption of the Federal Constitution did not abrogate the treaty. Constitution of United States; *Spooner* v. *McConnell, supra;* Ordinance of 1787; *Wilson* v. *Blackbird Creek Co.,* 3 Pet. 245; *Hogg* v. *Zanesville Manuf. Co.,* 5 Ohio, 410; *Woodbourn* v. *Kilbourn Manuf. Co.,* 1 Abb. 158; *Pollard* v. *Hogan's*

Lessee, 3 How. 212; *Permolli* v. *First Municipality,* id. 589; *Strader* v. *Graham,* 10 id. 82; *Dred Scott,* 19 id. 396; *Howard* v. *Ingersoll,* 13 id. 405; American State Papers, Public Lands, vol. i. 103; President's Message, 1835, Dec. 8, Senate Doc. 1, p. 108; Engineer Report, 1838, MSS.; President's Message, February, 1840, Doc. 2; id. July, 1850, Ex. Doc. 19; Appropriation Acts, 1828-73; Annual Report, Gen. Gilmore, 1873, pp. 16, 17; *Gilman* v. *Philadelphia,* 3 Wall. 928; *Fowler* v. *Lindsey,* 3 Dall. 411.

4. The acts of Congress should be so construed and executed as not to invade the rights of the State under the compact (*Aldridge* v. *Williams,* 3 How. 24; *Savings-Bank* v. *United States,* 19 Wall. 237; *Fisher* v. *United States,* 2 Cranch, 385; *United States* v. *Kirby,* 7 Wall. 486; *Dash* v. *Vankleek,* 7 Johns, 502; *Cohens* v. *Virginia,* 6 Wheat. 264; *Comm.* v. *Dounes,* 24 Pick. 230), or to give preference to the ports of one State over those of another.

5. The State is the proper party complainant. *Georgetown* v. *Canal Co.,* 12 Pet. 91; *Cohens* v. *Virginia,* 6 Wheat. 264; *Georgia* v. *Stanton,* 6 Wall. 75.

6. The equity side of the court is properly invoked. *Wheeling Bridge Case,* 13 How. 560; *Georgetown* v. *Canal Co., supra.*

7. The court will not enter into the question as to the degree of the obstruction. *Green* v. *Biddle,* 8 Wheat. 2; *King* v. *Ward,* 4 Ad. & El. 384.

Mr. Solicitor-General Phillips, contra.

1. South Carolina and Georgia, by becoming members of the Union, stripped themselves of all power under the second article of their agreement of 1787, when the United States undertook to regulate the navigation of the river.

*8 Both States * were, thereafter, excluded from interference with it. *Cooley* v. *Board of Wardens of Port of Philadelphia et al.,* 12 How. 299; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Crandall* v. *State of Nevada,* 9 id. 35.

2. That agreement confers no present rights upon citizens of South Carolina to navigate the Savannah. Their rights, in common with those of all citizens of the United States, are perfect under the Constitution, and cannot be vindicated by a suit in the name of the State.

3. When a State brings suit in a court of the United States, it appears in its private capacity, is treated as other litigants, and must make out such a cause of action as would entitle them, under the same circumstances, to recover. *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.,* 18 How. 518; *City of Georgetown* v. *The Alexandria Canal Co.,* 12 Pet. 91. The property rights of South Carolina are not involved, and there is no pretence of any apprehended damage to them by reason of this pretended obstruction. The only ground of complaint is, that the interests of her citizens may be thereby injuriously affected.

4. The navigation of the Savannah River will not be obstructed by the contemplated mode of improvement. The plan therefor adopted after thorough examination by experienced and skilful engineers, and approved by the appropriate committees of the two houses, received the ultimate sanction of Congress. That body has the unquestionable power to improve the navigable waters of the United States, and is the exclusive judge of the most expedient mode of exercising it. Full discretion in the expenditure of the sum appropriated has been confided to the Secretary of War, who will carry out that plan. It is an idle pretence, that, by so doing, preference will be given to the ports of one State over those of another.

Mr. Justice Strong delivered the opinion of the court.

We do not perceive that, in this suit, the State of South Carolina stands in any better position than that which she would occupy if the compact of 1787 between herself and Georgia had never been made. That compact defined the

*9 boundary between the two States as the most northern branch * or stream of the river Savannah from the sea, or mouth of the stream, to the fork or confluence of the rivers then called Tugoloo and Keowee. The second article declared that the navigation of the river Savannah, at and from the bar and mouth, along the north-east side of Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of said island, and from thence up the bed or principal stream of the said river to the confluence of the rivers Tugoloo and Keowee, . . . should thenceforth be equally free to the citizens of both States, and exempt from all duties, tolls, hinderance, interruption, or molestation whatsoever, attempted to be enforced by one State on the citizens of the other. Undoubtedly this assured to the citizens of the two States the free and unobstructed navigation of the channel described, precisely the same right which they would have possessed had the original charters of the two provinces, Georgia and South Carolina, fixed the Savannah River as the boundary between them. It needed no compact to give to the citizens of adjoining States a right to the free and unobstructed navigation of a navigable river which was the boundary between them. But it matters not to this case how the right was acquired, whether under the compact or not, or what the extent of the right of South Carolina was in 1787. After the treaty between the two States was made, both the parties to it became members of the United States. Both adopted the Federal Constitution, and thereby joined in delegating to the general government the right to "regulate commerce with foreign nations, and among the several States." Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as between themselves or against others, they both agreed that Congress might thereafter do every thing which is within the power thus delegated. That the power to regulate inter-State commerce, and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States,—rivers that are accessible from other States, at least to the extent of improving their navigability,—has not

*10 been questioned during the argument, nor could it be with any show of * reason. From an early period in the history of the government, it has been so understood and determined. Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to "regulate commerce," conferred by the Constitution upon Congress, is that which previously existed in the States. As was said in *Gilman* v. *Philadelphia,* 3 Wall. 724, "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the

nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament of England." Such has uniformly been the construction given to that clause of the Constitution which confers upon Congress the power to regulate commerce.

But it is insisted on behalf of the complainant, that, though Congress may have the power to remove obstructions in the navigable waters of the United
*11 States, it has no right to * authorize placing obstructions therein; that while it may improve navigation, it may not impede or destroy it. Were this conceded, it could not affect our judgment of the present case. The record exhibits that immediately above the city of Savannah the river is divided by Hutchinson's Island, and that there is a natural channel on each side of the island, both uniting at the head. The obstruction complained of is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern, by increasing the flow of the water through the former, thus increasing its depth and water-way, as also the scouring effects of the current. The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the water-way of one of its channels, and compelling navigation to use the other channel; but is it a means employed to render navigation of the river more convenient,—a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand-bank, or a jetty pushed out into the stream to narrow the water-way, and increase the depth of water and the direction and the force of the current, or the pier of a bridge standing where vessels now pass, and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense, obstructions to navigation; but, so far as they tend to facilitate commerce, it is not claimed that they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet all, except the pier, are improvements to its navigability, and consequently they add new facilities to the conduct of commerce. It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may
*12 build * lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over inter-State and foreign commerce is concerned, this is not to be doubted. Might not the States of South Carolina and Georgia, by mutual agreement, have constructed a

dam across the cross-tides between Hutchinson and Argyle Island, and thus have confined the navigation of the Savannah River to the southern channel? Might they not have done this before they surrendered to the Federal government a portion of their sovereignty? Might they not have constructed jetties, or manipulated the river, so that commerce could have been carried on exclusively through the southern channel, on the south side of Hutchinson Island? It is not thought that these questions can be answered in the negative. Then why may not Congress, succeeding, as it has done, to the authority of the States, do the same thing? Why may it not confine the navigation of the river to the channel south of Hutchinson's Island; and why is this not a regulation of commerce, if commerce includes navigation? We think it is such a regulation.

Upon this subject the case of *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.,* 18 How. 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of law,* an obstruction of navigation. It was, therefore, decided that an act of Congress declaring a bridge over the Ohio River, which in fact did impede steamboat navigation, to be a lawful structure, and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate Commerce.

It was further ruled that the act was not in conflict with the provision of the Constitution, which declares that no preference shall be given by any regu-
*13 lation of commerce or revenue * to the ports of one State over those of another. The judgment in that case is, also, a sufficient answer to the claim made by the present complainant, that closing the channel on the South Carolina side of Hutchinson's Island is a preference given to the ports of Georgia forbidden by this clause of the Constitution. It was there said that the prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce. "It will not do," said the court, "to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power." The case of *The Clinton Bridge,* 10 Wall. 454, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream.

The plaintiff next contends that if Congress has the power to authorize the construction of the work in contemplation and in progress, whereby the water will be diverted from the northern into the southern channel of the river, no such authority has been given. With this we cannot concur. By an act of Congress of June 23, 1874, an appropriation was made of $50,000, to be expended under the direction of the Secretary of War, for the repair, preservation, and completion of certain public works, and, *inter alia,* "for the improvement of the harbor of Savannah." The act of March 3, 1875, made an additional appropriation of $70,000, "for the improvement of the harbor of Savannah, Georgia." It is true that neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the Secretary of War, and the mode adopted under his supervision plainly tends to

the improvement contemplated. We know judicially the fact that the harbor is the river in front of the city, and the case, as exhibited by the pleadings, reveals that the acts of which the plaintiff complains tend directly to increase the volume of water in the channel opposite the city, as well as the width of the water-
*14 way. Without * relying at all upon the report of the engineers, which was before Congress, and which recommended precisely what was done, we can come to no other conclusion than that the defendants are acting within the authority of the statutes, and that the structure at the cross-tides intended to divert the water from the northern channel into the southern is, in the judgment of the law, no illegal obstruction. The plaintiff has, therefore, made no case sufficient to justify an injunction, even if the State is in a position to ask for it.

But, in resting our judgment upon this ground, we are not to be understood as admitting that a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court. Upon that subject we express no opinion. It is sufficient for the present case to hold, as we do, that the acts of the defendants, of which South Carolina complains, are not unlawful, and consequently that there is no nuisance against which an injunction should be granted.

The special injunction heretofore ordered is dissolved, and the

Bill dismissed.

State of New Hampshire v. State of Louisiana and Others.

State of New York v. State of Louisiana and Others.

Supreme Court of the United States, 1883.

[108 *United States,* 76.]

1. The history of article XI. of the amendment to the Constitution which provides that the judicial power of the federal courts shall not extend to suits against a State by a citizen of another State, or by citizens or subjects of a foreign State, and the causes which led to its adoption, reviewed.
2. Unless the State prosecuted consents, that amendment prohibits the court from entertaining jurisdiction of a cause in which one State seeks relief against another State on behalf of its citizens, in a matter in which the State prosecuting has no interest of its own. One State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other States to its citizens.
3. The relation of one of the United States to its citizens is not that of an independent sovereign State to its citizens. A sovereign State seeking redress of another sovereign State on behalf of its citizens can resort to war on refusal, which a State cannot do.
4. The qualifications of the duty of a sovereign State to assume the collection of the debts of its citizens from another sovereign State considered and stated.

The case on which the opinion is given is thus stated by the court.

On the 18th of July, 1879, the general court of New Hampshire passed an act, of which the following is a copy:

"An Act to protect the rights of citizens of this state, holding claims against other States.

"Be it enacted by the Senate and House of Representatives in General Court convened.

Section 1. Whenever any citizen of the State shall be the owner of any claim against any of the United States of America, arising upon a written obligation to pay money issued by such State, which obligation shall be past due and unpaid, such citizen holding such claim may assign the same to the State of New
*77 Hampshire, and deposit the assignment thereof, duly executed * and acknowledged in the form and manner provided for the execution and acknowledgment of deeds of real estate by the laws of this State, together with all the evidence necessary to substantiate such claim, with the attorney-general of the State.

Sec. 2. Upon such deposit being made, it shall be the duty of the attorney-general to examine such claim and the evidence thereof, and if, in his opinion, there is a valid claim which shall be just and equitable to enforce, vested by such assignment in the State of New Hampshire, he, the attorney-general, shall, upon the assignor of such claim depositing with him such sum as he, the said attorney-general, shall deem necessary to cover the expenses and disbursements incident to, or which may become incident to the collection of said claim, bring such suits, actions or proceedings in the name of the State of New Hampshire, in the Supreme Court of the United States, as he, the said attorney-general, shall deem necessary for the recovery of the money due upon such claim; and it shall be the duty of the said attorney-general to prosecute such action or actions to final judgment, and to take such other steps as may be necessary after judgment for the collection of said claim, and to carry such judgment into effect, or, with the consent of the assignor, to compromise, adjust, and settle such claim before or after judgment.

"Sec. 3. Nothing in this act shall authorize the expenditure of any money belonging to this State, but the expenses of said proceedings shall be paid by the assignor of such claim; and the assignor of such claim may associate with the attorney-general in the prosecution thereof, in the name of the State of New Hampshire, such other counsel as the said assignor may deem necessary, but the State shall not be liable for the fees of such counsel, or any part thereof.

"Sec. 4. The attorney-general shall keep all moneys collected upon such claim, or by reason of any compromise of any such claim, separate and apart from any other moneys of this State which may be in his hands, and shall deposit the same to his own credit, as special trustee under this act, in such bank or banks as he shall select; and the said attorney-general shall pay to the assignor of such claims all such sums of money as may be recovered by him in compromise or settlement of such claims, deducting therefrom all expenses incurred by said attorney not before that time paid by the assignor.
*78 * "Sec. 5. This act shall take effect on its passage."

Under this act six of the consolidated bonds of the State of Louisiana, particularly described in the cases of *State ex rel. Elliott* v. *Jumel* and *Elliott* v. *Wiltz,* 107 U. S. 711, were assigned to the State of New Hampshire by one of its citizens. This assignment was made for the purposes contemplated in the act, and passed to the State no other or different title than it would acquire in that way. After the assignment was perfected a bill in equity was filed in this court in the name of the State of New Hampshire, as complainant, against the State of Louisiana and the several officers of that State who compose the board of liquidation provided for in the act authorizing the issue of the bonds. The averments in the bill were substantially the same as those in *Elliott* v. *Jumel,* save only that in this case the ownership of the bonds specially involved was stated to be in New Hampshire, while in that it was in Elliott and his associates. The prayer was in substance for a decree that the bonds and the act and constitutional amendment of 1874 constitute a valid contract between Louisiana and the holders of its bonds; that the defendants and each of them might be prohibited from diverting the proceeds of the taxes levied under the act from the payment of the interest, and that the provisions of the debt ordinance of 1879 might be adjudged void and of no effect, because they impaired the obligation of the contract. The bill was signed in the name of New Hampshire by the attorney-general of that State and also by the same counsel who appeared for Elliott, Gwynn & Walker in their suit in equity reported in 107 U. S.

On the 15th of May, 1880, the legislature of New York passed the following act:

"An Act to protect the rights of citizens of this State owning and holding claims against other States.

"*The people of the State of New York, represented in Senate and Assembly, do enact as follows:*

"Section 1. Any citizen of this State, being the owner and holder of
*79 any valid claim against any of the United States of * America, arising upon a written obligation to pay money, made, executed, and delivered by such State, which obligation shall be past due and unpaid, may assign the same to the State of New York, and deliver the assignment thereof to the attorney-general of the State. Such assignment shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly indorsed upon such assignment before the delivery thereof. Every such assignment shall contain a guaranty, on the part of the assignor, to be approved by the attorney-general, of the expenses of the collection of such claim, and it shall be the duty of the attorney-general, on receiving such assignment, to require on behalf of such assignor, such security for said guaranty as he shall deem adequate.

"Sec. 2. Upon the execution and delivery of such assignment, in the manner provided for in section one of this act, and furnishing the security as in said section provided, and the delivery of such claim to him, the attorney-general shall bring and prosecute such action or proceeding, in the name of the State of New York, as shall be necessary for the recovery of the money due on such claim, and the said attorney-general shall prosecute such action or proceeding to final judg-

ment, and shall take such proceedings after judgment as may be necessary to effectuate the same.

"SEC. 3. The attorney-general shall forthwith deliver to the treasurer of the State, for the use of such assignor, all moneys collected upon such claim, first deducting therefrom all expenses incurred by him in the collection thereof, and said assignor, or his legal representatives, shall be paid said money by said treasurer upon producing the check or draft therefor of the attorney-general to his or their order and proof of his or their identity.

"SEC. 4. This act shall take effect immediately."

On the 20th of April, 1881, E. K. Goodnow and Benj. Graham, being the holders and owners of thirty coupons cut from ten of the consolidated bonds of Louisiana falling due January 1st, 1880, July 1st, 1880, and January 1st, 1881, assigned them to the State of New York by an instrument in writing, of which the following is a copy:

*80 * "Know all men by these presents, that we, the undersigned, citizens of the State of New York, being the owners and holders of valid claims against the State of Louisiana, arising upon written obligations to pay money, made, executed, and delivered by the State of Louisiana, and now past due and unpaid, being the coupons hereto annexed, in consideration of one dollar to each of us paid by the State of New York, and for other good and valuable considerations, hereby assign and transfer the said claims and coupons to the State of New York.

"And we do hereby covenant with the said State that if an attempt is made by it to collect the said claim from the State of Louisiana we will pay all the expenses of the collection of the same.

"In witness whereof we have hereunto set our hands and affixed our seals this twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-one.

"E. K. GOODNOW. [L. S.]
"BENJ. GRAHAM. [L. S.]

"Sealed and delivered in presence of—
"FRANK M. CARSON."

Thereupon the State of New York, on the 25th of April, filed in this court a bill in equity against the State of Louisiana and the officers of the State composing the board of liquidation, with substantially the same averments and the same prayer as in that of the State of New Hampshire. There was, however, a statement in this bill not in the other, to the effect that many of the consolidated bonds were issued to citizens of the State of New York in exchange for old bonds of Louisiana which they held, and that citizens of New York now hold and own bonds of the same class to a large amount. Testimony has been taken in support of this averment.

Mr. Wheeler H. Peckham for the State of New Hampshire.—I. The controversy is one arising on a contract. This species of controversy is within the jurisdiction of the court.—II. The particular contracts are negotiable instruments of which the State by assignment is legal owner, and in the suit is the real
*81 party in interest, whether the transfer was an * actual sale or merely color-

able. *Sheridan* v. *The Mayor,* 68 N. Y. 30; *Mercer County* v. *Hackett,* 1 Wall. 83; *Nat. Bank* v. *Texas,* 20 Wall. 72; Edwards on Bills, 130-132; *Hays* v. *Hathorn,* 74 N. Y. 468.—III. The remedy is not sought against the State, but against other defendants to restrain them from diversion of funds. If the State cannot be made a party, a court of equity will proceed without it. *Board of Liquidators* v. *McComb,* 92 U. S. 531. New Hampshire seeks only the relief which would be granted in a suit between individuals in a circuit court. Louisiana had power to issue these bonds; New Hampshire power to acquire them. *United States* v. *Bank,* 15 Pet. 377; *Union Branch Railroad Company* v. *East Tennessee, &c., Railroad Company,* 14 Geo. 327. The creditor State is entitled here to the same remedies against the debtor State, which one individual would have against another in a circuit court.—IV. The fact that the ownership is acquired under a statute does not oust the jurisdiction. No citizen of one country can sue in the courts of his own country any other State or sovereignty, nor can he sue such other State in its own courts. He must resort to his sovereign (*i. e.,* New Hampshire), for redress; and under the federative system this court, in a controversy between States, takes the place of the last resort of independent nations. *Rhode Island* v. *Massachusetts,* 12 Peters, 657.—V. This jurisdiction extends even to political questions between States, when a judicial question arises for their settlement. *Rhode Island* v. *Massachusetts, ubi sup.*; *Virginia* v. *West Virginia,* 11 Wall. 39. *Mr. Peckham* also discussed some provisions of the Constitution of Louisiana, and the peremptory remedies sought for.

Mr. Leslie W. Russell, Attorney-General of New York, *Mr. David Dudley Field* and *Mr. William A. Duer,* for the State of New York.—The parties to the controversy, the States of New York and Louisiana; and the officers of the latter charged with the assessment and collection of taxes and payment of the debt; the subject of the controversy—a contract by the State of Louisiana for the payment of money; and the remedies sought for the enforcement of that contract are
*82 all * within the jurisdiction of the court when properly brought before it.
—I. A State of this Union can implead another State in this court for a money demand. *Van Stophorst* v. *Maryland,* 2 Dallas, 401; *Oswald* v. *New York,* 2 Dallas, 401, 402 and 415; *Chisholm* v. *Georgia,* 2 Dallas, 419; *Grayson* v. *Virginia,* 3 Dallas, 320; *Hollingsworth* v. *Virginia,* 3 Dallas, 378; *Huger* v. *South Carolina,* 3 Dallas, 339; *Cutting* v. *South Carolina,* 2 Dallas, 415, note; *New York* v. *Connecticut,* 4 Dallas, 1.—II. The assignment of the demand for the purpose of suing does not affect this right. The right and duty of every sovereign State, on behalf of its citizens, to call upon any other sovereign State for the fulfilment of its obligations to those citizens, is an established rule of international law. Our own country has acted upon it so often, that with us it is no longer an open question. Our diplomatic correspondence is full of references to it. The argument cites also Stat. 4 Hen. IV. ch. 7; Ordonance de la Marine, 1681; Grotius, B. 3 ch. 2, sec. 5 subdivision 2; Vattel, book 2, ch. 18, page 347, with Ingersoll's notes, 1869; Rives' Life of Madison, vol. 1, 564; vol. 2, 41; Manning's Law of Nations, 150 (Amos edition); 2 Twiss' Law of Nations, sec. 11; 2 Phil. Int. Law, 8; The Federalist. The extent of the jurisdiction over controversies between the States, and the manner of exercising it, have been so often considered by the court, that a reference to the cases is hardly necessary. Thus the suit of New Jersey against New York, begun in 1830, appears three times in the reports, and that of Rhode Island against Massachusetts, begun in 1832, appears five times. *New Jersey* v. *New York,* 3 Pet. 461; 5 Pet. 284, where Chief Justice Marshall goes over the subject, and 6 Pet. 323; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, where the jurisdiction was considered at length by Mr. Justice Baldwin; 13 Pet. 23, 14 Pet.

210, 15 Pet. 233, and 4 How. 591. In *Poole* v. *Fleeger,* 11 Pet. 185, 209, Mr. Justice Story, delivering the opinion of the court used this language respecting the rights of the States, under the law of nations, independent of the Constitution. . . . "It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed
*83 boundaries between their respective * territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction requiring the consent of Congress. The Constitution declares, that 'No State shall, without the consent of Congress, enter into any agreement or compact with another State;' thus plainly admitting that, with such consent it might be done; and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."—III. Even if a suit cannot be maintained against the State, its officers can be required to apply the money in their hands to the payment of interest. *Kendall's Case,* 12 Pet. 527; the *King* v. *Lord Commissioners,* 5 Nev. and Man. 589; 6 Nev. and Man. 508.—IV. They may, also, in case the amount in their hands is insufficient for that purpose, be required to assess and collect a tax. *Board Comrs. Knox County* v. *Aspinwall and others,* 24 How. 376; *Supervisors* v. *United States,* 4 Wallace, 435; *Von Hoffmann* v. *City of Quincy,* 4 Wall. 535; *City of Galena* v. *Amy,* 5 Wall. 705; *Walkley* v. *City of Muscatine,* 6 Wall. 481; *Mayor* v. *Lord,* 9 Wall. 409; *United States* v. *Boutwell,* 17 Wall. 604; *Heine* v. *Levee Commissioners,* 19 Wall. 655; *Loan Association* v. *Topeka,* 20 Wall. 655; *Board of Liquidation* v. *McComb,* 92 U. S. 531; *United States* v. *Memphis,* 97 U. S. 284; *Memphis* v. *United States,* 97 U. S. 293; *Memphis* v. *Brown,* 97 U. S. 300; *United States* v. *Fort Scott,* 99 U. S. 152; *County of Greene* v. *Daniel,* 102 U. S. 187; *Louisiana* v. *New Orleans,* 102 U. S. 203; *Louisiana* v. *United States,* 103 U. S. 289; *Wolff* v. *New Orleans,* 103 U. S. 358.

*84 * *Mr. J. C. Egan,* Attorney-General of Louisiana, and *Mr. John A. Campbell* for the State of Louisiana.—I. The judicial power of the United States does not extend to suits against a State.—II. An agreement by a State with an individual creates no juridical obligation and no juridical relation between the parties. Federalist, No. 81; 6 Webster's Works, 537: 1 Calhoun's Works, 260. The clause in the Constitution forbidding a State to impair the obligation of a contract has no application to such agreements. The term "contract" is narrower than the term "agreement." A contract is an agreement which raises an obligation that can be enforced at law. Anson on Contracts, sec. 9; Pollock on Contracts, 6; Austin on Jurisprudence, 1016, 17. This distinction was known to the framers of the Constitution, and they used language applicable to perfect obligations, which could be enforced at law, and which had no application to those imperfect obligations which men owe to themselves or their families, or their neighbors, but which cannot be enforced at law. This distinction is recognized in the English courts, *Crouch* v. *Credit Foncier,* L. R. 8 Q. B. at page 384; and by French jurists, 42 Dalloz, Jurisp. Gen. Tresor public, No. 1105; and by this court, *Bank of United States* v. *United States,* 5 How. 382. He also cited 15 Laurent, No. 424, p. 477; 1 Picot, Code Civ. p. 162-3; Larombière des Obligations, 360-364;

ib. 58-59; 1 Bentham's Works, 148; *Sturges* v. *Crowinshield,* 4 Wheat. 122, 208; *Dartmouth College* v. *Woodward,* 4 Wheat. 518; *Ogden* v. *Saunders,* 12 Wheat. 213, 332.—III. The United States enjoy immunity from suits as matter of right. *United States* v. *Clarke,* 8 Pet. 436; *Briscoe* v. *Bank,* 11 Pet. 257; *United States* v. *McLemore,* 4 How. 286; *The Siren,* 7 Wall. 152; *The Davis,* 10 Wall. 15; *Carr* v. *United States,* 98 U. S. 433; *United States* v. *Thompson,* ib. 486. An obligation to pay the debts contracted before the Constitution was inserted in article VI. It was part of the supreme law. But the creditors had no *vinculum juris.* Theirs were *pacta quæ non habent causam civilem.* This is a case strictly analogous to the case stated in the bill.—IV. This is not a controversy between States. It is a vicarious controversy between individuals. Controversies be-
*85 tween States have little resemblance * to those between individuals. They arise out of public relations and intercourse, and involve political rights. —V. Courts of chancery discourage suits that are artificially produced, and do not arise on the relations of the parties. The merchandise consisting merely of a faculty to come into court, is not allowed.—VI. The rule of chancery is that the immediate parties to a contract, or their successors, are necessary parties to a suit for its enforcement. In this case the State is the only party indebted, or charged to be indebted. The object of the bill is to establish a debt against her, to be paid out of money belonging to her. *Shields* v. *Barrow,* 17 How. 130; *Coiron* v. *Millauden,* 19 How. 113; Pomeroy on Contracts, 546, 484-5, 491.—VII. In the New York case an argument of a wider scope is presented; that the State of New York, having been a sovereign, and with powers to make war, issue letters of marque and reprisal, and otherwise to act in a belligerent way, resigned these powers into the control of the United States, to be held in trust, and therefore this court must make decrees in the cases in favor of the plaintiff, for judgment, making declaration of the default of Louisiana, and to subject her collecting agencies and accounting officers to the demands of the bill, and to compel the collection of taxes, to pay all the holders of coupons and bonds within the State of New York their interest and principal, from year to year, till the debt becomes due in A. D. 1914. No precedent of such a suit has been cited, and it must be admitted the present has the merit of originality and invention. It is opposed to the general practice of nations, and the testimony of the leading bankers of Great Britain and of the leading financiers of Europe; is a dissent and contradiction to any policy or right to use governmental power in such cases. Mr. Campbell reviewed the acts of government in such cases, and closed with an argument upon the constitutions of Louisiana.

Mr. Peckham and *Mr. Field* replied.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the case he continued:

*86 * The first question we have to settle is whether, upon the facts shown, these suits can be maintained in this court.

Art. III., sec. 2, of the Constitution provides that the judicial power of the United States shall extend to "controversies between two or more States," and "between a State and citizens of another State." By the same article and section it is also provided that in cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." By the Judiciary Act of 1789, c. 20, sec. 13, 1 Stat. 80, the Supreme Court was given "exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and

its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Such being the condition of the law, Alexander Chisholm, as executor of Robert Farquar, commenced an action of assumpsit in this court against the State of Georgia, and process was served on the governor and attorney-general. *Chisholm v. Georgia,* 2 Dall. 419. On the 11th of August, 1792, after the process was thus served on Mr. Randolph, the attorney-general of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next term, unless the State should then, after notice, show cause to the contrary. At the next term Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph, thereupon, proceeded alone, and in opening his argument said, "I did not want the remonstrance of Georgia, to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read, I had learnt from the acts of another State, whose will must always be dear to me, that she too condemned it."

On the 19th of February, 1793, the judgment of the court was announced, and the jurisdiction sustained, four of the justices being in favor of granting the motion and one against it. All the justices who heard the case filed opinions,
some of which were very elaborate, and it is evident the subject received
*87 * the most careful consideration. Mr. Justice Wilson in his opinion uses this language, p. 465:

"Another declared object (of the Constitution) is, 'to establish justice.' This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the declaration, 'that no State shall pass a law impairing the obligation of contracts,' we shall probably think, that this object points, in a particular manner, to the jurisdiction of the court over the several States. What good purpose could this constitutional provision *secure,* if a State might pass a law impairing the obligation of *its own* contracts; and be amenable for such a violation of right, to no controlling judiciary power?"

And Chief Justice Jay, p. 479:

"The extension of the judiciary power of the United States to such controversies, appears to me to be *wise,* because it is *honest,* and because it is *useful.* It is *honest,* because it provides for doing justice without respect to persons, and by securing individual citizens, as well as States, in their respective rights, performs the promise which every government makes to every free citizen, of equal justice and protection. It is *useful,* because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to

obtain justice without any danger of being overborne with the might and number of their opponents; and because it brings into action, and enforces the great and glorious principle, that the people are the sovereigns of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined."

*88 Prior to this decision the public discussions had been confined * to the power of the court, under the Constitution, to entertain a suit in favor of a citizen against a State; many of the leading members of the convention arguing, with great force, against it. As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the governor. This led to the convening of the general court of that commonwealth, which passed resolutions instructing the senators and requesting the members of the House of Representatives from the State "to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States." Other States also took active measures in the same direction, and, soon after the next Congress came together, the eleventh amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go into effect on the 8th of January, 1798. That amendment is as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State."

Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective States, after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens.

The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citi-

*89 zens of one State against another * State. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons. In New Hampshire, before the attorney-general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney-general such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the attorney-general, as special trustee, separate and apart from the other moneys of

the State, and paid over by him to the owner of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the attorney-general, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the State and the attorney-general are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the State.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses and gets all the money that is recovered. This State, as well as New Hampshire, is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

It is contended, however, that, notwithstanding the prohibition of the amendment, the States may prosecute the suits, because, as the "sovereign and
*90 trustee of its citizens," a State is * "clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former." There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. As was said in the *United States* v. *Diekelman,* 92 U. S. 520, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be "as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war."

All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, "enter into any agreement or compact with another State." Art. 1, sec. 10, cl. 3.

But it is said that, even if a State, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another State by force, it got in lieu the constitutional right of suit in the national courts. There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his Commentaries on International Law, vol. II., 2d ed., page 12:

"As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State."

Whether this be in all respects true or not, it is clear that no nation
*91 ought to interfere, except under very extraordinary circumstances, * if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. Under the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief his State could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm case, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and

The bill in each case is dismissed.

United States v. State of Louisiana.

Supreme Court of the United States, 1887.

[123 *United States*, 32.]

The Court of Claims has jurisdiction of an action by a State against the United States for a demand arising upon an act of Congress.

The action of a State in the Court of Claims to recover moneys received by the United States from sales of swamp lands granted to the State by the act of September 28, 1850, is not barred by the statute of limitations until six years after the amount is ascertained from proofs of the sales before the Commissioner of the General Land Office.

The direct tax laid by the act of August 5, 1861, did not create any liability on the part of the States, in which the lands taxed were situated, to pay the tax.

The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. Heber J. May* for appellant, cited: *United States* v. *Ravara,* 2 Dall. 298; Spear Fed. Judiciary, 252; *Ames* v. *Kansas,* 111 U. S. 449; *Ex parte Russell,* 13 Wall. 664; *United States* v. *McDougall's Administrator,* 121 U. S. 89; *State of Texas Case,* 7 C. Cl. 301; *State of Illinois Case,* 20 C. Cl. 342; *State of New Hampshire Case,* 20 C. Cl. 394; *Rice* v. *United States,* 122 U. S. 611; *Wright* v. *Roseberry,* 121 U. S. 488; *Five Per Cent Cases,* 110 U. S. 471; *Marshall's Case,* 21 C. Cl. 308; *Ramsay's Case,* 14 C. Cl. 367; *Woolner's Case,* 13 C. Cl. 355; *Portland Company's Case,* 5 C. Cl. 441; *Nichols* v. *United States,* 7 Wall. 122; *Davidson's Case,* 21 C. Cl. 298, and cases therein cited.

Mr. William E. Earle for appellee, cited: *Turner* v. *Smith,* 14 Wall. 553; *Beauregard* v. *Case,* 91 U. S. 134; *Baldwin* v. *Stark,* 107 U. S. 463; *Marquez* v. *Frisbie,* 101 U. S. 473; *Shepley* v. *Cowan,* 91 U. S. 330; *Speidel* v. *Henrici,* 120 U. S. 377; *Emigrant Co.* v. *County of Wright,* 97 U. S. 339; *Emigrant Co.* v. *County of Adams,* 100 U. S. 67; *Mills County* v. *Railroad Companies,*
*33 107 U. S. 557; *Ames* v. *Kansas,* 111 * U. S. 449; *Börs* v. *Preston,* 111 U. S. 252; *Five Per Cent Cases,* 110 U. S. 471; *Tennessee* v. *Davis,* 100 U. S. 257; *State of Texas Case,* 7 C. Cl. 301; *State of Illinois Case,* 20 C. Cl. 342; *State of New Hampshire Case,* 20 C. Cl. 394.

Mr. Justice Field delivered the opinion of the court.

This action was brought in the Court of Claims by the State of Louisiana against the United States, to recover two demands, amounting in the aggregate to the sum of $71,385.83. The first of these demands arises upon the act of Congress of February 20, 1811, 2 Stat. 641, c. 21, "to enable the people of Orleans to form a constitution and state government," the fifth section of which declared that five per cent of the net proceeds of the sales of lands of the United States, within her limits, after the first day of January next ensuing, should be applied to laying out and constructing public roads and levees in the State, as its legislature might direct. Pursuant to the authority thus conferred, the people of the Territory of Orleans, represented in a convention called for that purpose, formed themselves into a State, by the name of Louisiana, and adopted a constitution under which the State was admitted into the Union. The five per cent of the net proceeds of sales of lands of the United States, made between July 1, 1882, and June 30, 1886, and due to the State by the United States, as found by the Commissioner of the General Land Office, amounted to $47,530.79.

The second of these demands arises upon the act of Congress of September 28, 1850, 9 Stat. 519, c. 84, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of March 2, 1855, 10 Stat. 634, c. 147, "for the relief of purchasers and locators of swamp and overflowed lands." The act of September 28, 1850, granted to the States then in the Union all the swamp and overflowed lands, made unfit thereby for cultivation, within their limits, which at the time remained unsold. The second section made it the duty of the Secretary of the Interior, as soon as practi-
*34 cable after the passage of the act, to prepare a list of the lands * described and transmit the same to the Governor of the State, and at his request to cause a patent to be issued therefor. It would seem that this duty was not dis-

charged; and, notwithstanding the grant was one *in præsenti,* many of the lands falling within the designation of swamp and overflowed lands were sold to other parties by the United States. The act of March 2, 1855, was designed to correct, among other things, the wrong thus done to the State; it provided that, upon due proof of such sales, by the authorized agent of the State, before the Commissioner of the General Land Office, the purchase money of the lands should be paid over to the State. Such proof was not made, but equivalent proof was submitted to the Commissioner as to the character of the lands from the field notes of the Surveyor General of the State. This mode of proof was accepted by the Commissioner in other cases as early as 1850. The amount found in this way by the Commissioner on the 30th of June, 1885, to be due to the State from the United States, on account of sales of swamp lands to individuals, made prior to March 3, 1857, was $23,855.04.

It does not appear that there was any serious contest in the Court of Claims, either as to the validity or the amount of these demands; but it was objected that the demand arising upon the acts of September 28, 1850, and of March 2, 1855, was barred by the statute of limitations, and that both demands were set off by the unpaid balance of the direct tax levied under the act of August 5, 1861, 12 Stat. 292, which was apportioned to the State of Louisiana. The First Comptroller of the Treasury had, at different times previous to the commencement of this action, admitted and certified that the sums claimed were due to the State on account of the five per cent net proceeds of sales of the public lands, and on account of sales of swamp lands within the State purchased by individuals; but had directed the amounts to be credited to the State on account upon the claim of the United States against her for the unpaid portion of the direct tax mentioned.

It was, also, objected in the Court of Claims, and the objection is renewed here, that that court had no jurisdiction, under the Constitution and laws
*35 of the United States, to hear * and determine a cause in which the State is a party in a suit against the United States. This objection, therefore, must first be examined; for, if well taken, it will be unnecessary to consider the other questions presented.

The Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish," and "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects. This clause was modified by the Eleventh Amendment, declaring that "the judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

As thus modified, the clause prescribes the limits of the judicial power of

the courts of the United States. The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is the petitioner draws it within the original jurisdiction of the Supreme Court. The same article of the Constitution which defines the extent of the judicial power of the courts of the United States, declares, that "in all cases affecting ambassadors, other public ministers, and consuls, and *those in which a State shall be party,* the Su-
*36 preme Court shall have original jurisdiction. In all other * cases," "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Although the original jurisdiction of the Supreme Court, where a State is a party, as thus appears, is not in terms made exclusive, there were some differences of opinion among the earlier judges of this court whether this exclusive character did not follow from a proper construction of the article. In a recent case, *Ames* v. *Kansas,* 111 U. S. 449, this question was very fully examined, and the conclusion reached that the original jurisdiction of the Supreme Court, in cases where a State is party, is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States. In that case, it is true, the action was commenced by the State in one of her own courts, and, on motion of the defendant, was removed to the Circuit Court of the United States, and the question was as to the validity of this removal. The case having arisen under the laws of the United States, it was one of the class which could be thus removed, if the Circuit Court could take jurisdiction of an action in which the State was a party. It was held that the Circuit Court could take jurisdiction of an action of that character, and the removal was sustained. The judiciary act of 1789, it is true, declares that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction." This clause, however, cannot have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United
*37 States upon any demand in the Circuit Court, or the Court * of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none.

The statute of limitations does not seem to us to have any application to the demand arising upon the swamp-land acts. The act of 1850 contemplates that

the Secretary of the Interior will identify the lands described, and although the State could not be deprived of her rights by the inaction of that officer, *Wright* v. *Roseberry*, 121 U. S. 488, 501, she was not obliged to proceed in their assertion in the absence of such identification. By the act of 1855, which provided for the payment to the State of moneys received by the United States on the sales of swamp lands within her limits, the payment was made to depend upon proof of the sales by the authorized agent of the State before the Commissioner of the General Land Office. No such proof was ever made or offered, and, therefore, until in some other equally convincing mode the swampy character of the lands sold was established to the satisfaction of the Commissioner, no definite ascertainment of the amount due to the State was had, so as to constitute a ground of action for its recovery in the Court of Claims. The method of proving the character of such lands by having recourse to the field-notes of the public surveys of the Surveyor-General of the State was adopted by the Commissioner as early as 1850, and was followed by him in this case in 1885. On the 30th of June of that year, he found in this mode and certified that there was due to the State from such sales the amount stated above. From that date only the six years within which the action could be brought in the Court of Claims begun to run; and this action was commenced in September of the following year.

*38 Nor do we regard the unpaid portion of the direct tax laid by the act of Congress of August 5, 1861, which was apportioned * to Louisiana, as constituting any debt to the United States by the State in her political and corporate character, which can be set off against her demands. 12 Stat. 292, c. 45. That act imposed an annual direct tax of twenty millions "upon the United States," and apportioned it to the several States of the Union. It directed that the tax should "be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling houses." (Sec. 13.) It was assessed and laid upon the real property of private individuals in the States. Public property of the States and of the United States was exempted from the tax. Its apportionment was merely a designation of the amount which was to be levied upon and collected from this property of individuals in the several States, respectively. The provisions of the act are inconsistent with any theory of the obligation of the States to pay the sums levied. It provides for the appointment of officers to assess the property to the different holders, and to collect the tax, and directs with minute detail the proceedings to be taken to enforce the collection, either by a distraint and sale of the personal property of the owners, or, that failing, by a sale of the real property taxed. It allows, it is true, the different States to assume the amounts apportioned to them respectively, and to collect the same in their own way by their own officers. Many of the States did thus assume the amounts, and in such cases it may well be considered that for the sums assumed they became debtors to the United States, and, so far as any portion of those sums has not been paid, that they still remain debtors. But, unless such assumption was had, no liability attached to any State in her political and corporate character. The liability was upon the individual land owners within her limits. The act declares that the amount of taxes assessed "shall be and remain a lien upon all lands and other real estate of the individuals who may be assessed for the same during two years after the time it shall annually become due and payable." (Sec. 33.) Louisiana never assumed the payment of the taxes apportioned to her, or of any portion of them.

She allowed the government to proceed by its officers to collect the tax from
*39 the property * holders. The amount apportioned to her was $385,886.67; the amount collected from the owners of land was $314,500.84; leaving only a balance of $71,385.83. It is not for us to suggest in what way this balance may be collected. After the war the Secretary of the Treasury was authorized to suspend the collection of the tax in any of the States previously declared in insurrection, until January, 1868, and subsequently this authority was extended to January, 1869. 14 Stat. 331, c. 298, § 14; 15 Stat. 260, c. 69. The Secretary acted upon this authority, and suspended the collection. It stated that, since 1869, no attempts have been made by the executive department to enforce its collection in those States. Be that as it may, it is enough for the disposition of the present case, that the unpaid balance of the tax apportioned to Louisiana constitutes no debt on the part of the State in her political and corporate character to the United States.

We perceive no error in the judgment of the court below, and it is, therefore,

Affirmed.

United States v. State of Louisiana.

Supreme Court of the United States, 1888.

[127 *United States*, 182.]

A claim by the State of Louisiana to 5 per cent of the net proceeds of the sales of the lands of the United States, under § 5 of the act of February 20, 1811, c. 21, 2 Stat., 641, and a claim by the same State to the proceeds of the sale by the United States of swamp lands, growing out of the provisions of the acts of September 28, 1850, c. 84, 9 Stat. 519, and March 2, 1855, c. 147, 10 Stat. 634, are claims against which the United States can set off the amount due to them by the State on matured coupons on bonds known as the Indian Trust bonds, issued by the State.

Under § 1069 of the Revised Statutes, the Court of Claims had no jurisdiction of so much of the claim to the 5 per cent fund as was credited to the State on the books of the Treasury Department more than six years before the bringing of the suit.

THE case is stated in the opinion of the court.

Mr. Attorney General and *Mr. Heber J. May* for appellant.
Mr. William E. Earle and *Mr. James L. Pugh, Jr.* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the United States from a judgment of the Court of Claims, awarding to the State of Louisiana the sum of $43,572.71.

There are claims of two kinds involved in the suit. The first claim arises under the act of February 20, 1811, c. 21, 2 Stat. 641, which authorized the inhabitants of Louisiana to form a constitution and a state government. The 5th section of that act provided as follows: "That five per centum of the net pro-

ceeds of the sales of the lands of the United States, after the first day of January, shall be applied to laying out and constructing public roads and levees in the said State, as the legislature thereof may direct."

*183 The second claim arises under §§ 1, 2, and 4 of the act * of September 28, 1850, c. 84, 9 Stat. 519, and §§ 1 and 2 of the act of March 2, 1855, c. 147, 10 Stat. 634. Sections 1, 2, and 4 of the act of 1850 read as follows: "That, to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State. SEC. 2. That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the land described as aforesaid and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee-simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid." "SEC. 4. That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated." Section 1 of the act of 1855 provided that the President should cause patents to be issued to purchasers or locators who had made entries of public lands claimed as swamp lands, prior to the issue of patents to the State, as provided for by § 2 of the act of 1850, except in certain specified cases. Section 2 of the same act provided as follows: "That upon due proof, by the authorized agent of the State or States, before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to the said State or States."

The State alleged, in its petitions in the Court of Claims, (for there were two suits, which were consolidated,) that the moneys due to it under the

*184 act of 1811, instead of being paid * over to it by the United States, had been unlawfully credited upon certain bonds alleged to have been issued by the State, and claimed to be held by the United States as an investment of certain Indian Trust funds; that, as to the acts of 1850 and 1855, moneys were due to the State thereunder, which had been legally ascertained and certified, but, instead of being paid over to the State, had been credited on bonds of the same kind; and that the sums referred to as being ascertained and found due to the State were trust funds, to be devoted to specific purposes, under the provisions of the acts granting them to the State.

The United States, in addition to a general traverse, put in a special plea of set-off, alleging that the State was indebted to the United States in the amount of interest which had accrued on bonds issued by the State and held by the United States.

The Court of Claims found as facts (1) that, of the 5 per cent fund accruing to the State under the act of 1811, there remains due from the United States to the State, as credited on the books of the Treasury Department, the following sums: May 8, 1879, $13,602.71; June 8, 1882, $63.47; February 7,

1884, $22,773.51; making a total of $36,439.09; and that, of the swamp-land fund accruing to the State under the acts of 1850 and 1855, there remains due from the United States to the State, as credited on the books of the Treasury Department, the following sums: May 26, 1886, $3803.02; September 9, 1886, $1110.00; May 2, 1887, $1730.41; May 4, 1887, $489.59; making a total of $7133.02; (2) that the First Comptroller of the Treasury, at the dates stated in finding 1, admitted and certified the above sums to be due to the State on account of the 5 per cent fund and the indemnity for swamp lands purchased by individuals within the State but directed those amounts to be credited on moneys due the United States, as stated in finding 3; and that it does not appear that the State authorities had knowledge of this proceeding; (3) that the United States own coupon bonds issued by the State, amounting to $37,000, payable in 1894, known as the Indian Trust bonds, and also hold and own overdue
*185 coupons attached to those bonds, representing the interest from May 1, 1874, to November 1, 1887, amounting to $31,080. The court gave a judgment in favor of the claimant for the total of the two amounts of $36,439.69 and $7133.02, namely, $43,572.71.

The contention of the United States in the Court of Claims was that, under § 1069 of the Revised Statutes, which provides that every claim against the United States, cognizable by that court, shall be forever barred unless the petition setting forth a statement thereof is filed in the court within six years after the claim first accrues, the court had no jurisdiction in respect to the sum of $13,602.71, credited on the books of the Treasury Department on the 8th of May, 1879, as a part of the 5 per cent fund, because the first of the two petitions was not filed until February 1, 1887. Deducting this sum of $13,602.71 from the $43,572.71, would leave the sum of $29,970; and it was contended by the United States that the claim for this sum was more than covered by the set-off of the $31,080, due by the State on the coupons on the Indian Trust bonds.

The Court of Claims held that the two funds in question, in the treasury of the United States, were trust moneys, to be held for special purposes, at first by the United States, and by the State after a transfer to it; that the trust had not been disavowed or annulled by Congress; that it became the duty of the executive officers of the United States, in charge of the funds, to hand them over to the State as a succeeding trustee; that the credit given to the State in the Treasury Department, on its indebtedness to the United States, for the amount of the coupons on the Indian Trust bonds, was without authority of law; that, consequently, the funds were free from liability to the set-off; and that the claim of the State to the $13,602.71 was not barred by § 1069 of the Revised Statutes.

The provisions of the swamp-land act of 1850 have been before this court in several cases. In *Emigrant Co.* v. *County of Wright,* 97 U. S. 339, at October Term, 1877, the State of Iowa had, by statute, granted the swamp lands to the counties of the State in which they might be found, with an injunction
*186 * that the lands and their proceeds should be appropriated to reclaiming the swamp lands; and if, when this was accomplished, anything was left, to building roads and bridges over the same; and lastly, the remainder to be used in building roads and bridges in other parts of the county. By subsequent

legislation of the State, the counties were authorized to depart from this injunction, and to use the lands for public buildings and internal improvements; but the assent of the majority of the voters of the county to such purpose was required. The State also authorized the sale of all the lands to any person or corporation by a written contract, to be in like manner submitted to the vote of the county; but the sale was to be subject to the proviso that the vendee should take the lands subject to all the provisions of the act of Congress of 1850. Wright County, with the assent of a majority of the voters of the county, having contracted in writing with the Emigrant Company to sell to it all the swamp lands in the county, and the claim of the county for indemnity against the United States for swamp lands which had been sold by the United States, and having executed a deed of a quantity of the lands to the company, the county filed a bill in equity to set aside the contract and deed, and obtained a decree to that effect in the Circuit Court. In the opinion of this court, delivered by Mr. Justice Miller, the proposition urged by the plaintiff in the suit was considered, namely, that the contract was void on its face, because it contemplated a diversion of the fund in violation of the original grant. As regarded that proposition, the court said: "It is not necessary to decide it in this case, and we do not decide that the contract is, for that reason alone, void. But we are of opinion that any purchaser of these lands from the county, or of the claim of the county to indemnity, must be held to know that in the hands of the county they were impressed with an important public trust, and that, in examining into the fairness and honesty of such a purchase, this consideration constitutes an important element of the decision." The court then proceeded, in its opinion, to hold that the contract must be rescinded, because of what
*187 amounted to fraud in the manner in which it was * procured, namely, that the officers and citizens of the county were ignorant of the nature and value of what they were selling; that the vendee was well informed in regard to both, and withheld such information unfairly from the officers of the county; and that there was a provision in the contract "for a diversion of the fund to other purposes, a gross inadequacy of consideration, and a successful speculation at the expense of the rights of the public."

Questions arising under the same act of Congress, of 1850, and the same legislation of Iowa, came before this court again, at October Term, 1879, in *Emigrant Co.* v. *County of Adams,* 100 U. S. 61. In that case the county of Adams had made a contract with the Emigrant Company to convey to it the county's swamp lands and claim for indemnity against the United States on account of swamp lands which had been sold by the United States, and had given a deed in pursuance of the contract. It afterwards filed a bill to rescind the contract and the deed, and obtained in the Circuit Court a decree to that effect, which this court reversed. The case was twice argued here. In the opinion of the court, delivered by Mr. Justice Bradley, it was stated that there was no sufficient proof that the contract was procured by false and fraudulent representations. It was also said, of the act of 1850, that by it the lands "were granted to the several States in which they lie for a purpose expressed on the face of the act; and that purpose was 'to enable the State to construct the necessary levees and drains to reclaim them.'" The opinion added: "Our first view was, that this trust was so explicit and controlling as to invalidate the

scheme finally devised by the legislature of Iowa for the disposal of the land, and under which the contract in question was made. But, on more mature reflection, after hearing additional argument, we are satisfied that such a result did not necessarily follow." The opinion then referred to the act passed by the legislature of Iowa in 1858, by which it was declared that it should be competent and lawful for the counties owning swamp and overflowed lands to devote the same, or the proceeds thereof, either in whole or in part, to the erection of
*188 public buildings for the * purpose of education, for the building of bridges, roads, and highways, and for building institutions of learning, or for making railroads through the county or counties to which such lands belonged. The opinion then proceeded: "The contract in dispute was made under this law, and our first impression was that it introduced a scheme subversive of the trust imposed upon the State by the act of Congress; that its effect was to devote the lands and proceeds thereof to purposes different from those which the original grant was intended to secure; that it threw off, or endeavored to throw off, all public responsibility in relation to the trust; and hence that the scheme itself and the contract based upon it were void. But a reconsideration of the subject has brought us to a contrary conclusion. The argument against the validity of the scheme is, that it effects a diversion of the proceeds of the lands from the objects and purposes of the congressional grant. These were declared to be to enable the State to reclaim the lands by means of levees and drains. The proviso of the second section of the act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the State was to have the full power of disposition of the lands; and only gives direction as to the application of the proceeds, and of this application only 'as far as necessary' to secure the object specified. It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof, or other suitable action, in a clear case of violation of the conditions. And, as the application of the proceeds to the named objects is only prescribed 'as far as necessary,' room is left for the exercise by the State of a large discretion as to the extent of the necessity.

In the present case it is not shown by allegations in the bill, or otherwise,
*189 * (if such a showing would be admissible,) that any necessity existed for devoting the proceeds of the lands in question to the purposes of drainage. No case is shown as the basis of any complaint, even on the part of the general government, much less on the part of the county of Adams, which voluntarily entered into the arrangement complained of. Our conclusion, therefore, is that this objection to the validity of the contract cannot prevail." The opinion then overruled the other grounds urged in favor of the plaintiff, reversed the decree below, and directed a decree to be entered dismissing the bill, without prejudice to the right of the county to bring an action at law for any breach of the terms of the contract.

The provisions of the swamp land act of 1850, and of the Iowa statutes in regard to the swamp lands, were again considered by this court in *Mills County* v. *Railroad Companies,* 107 U. S. 557, at October Term, 1882, the opinion of

the court being delivered by Mr. Justice Bradley. In that case, reference was made to *Emigrant Co.* v. *County of Wright, supra,* and it was said that the contract there "was declared to be void for actual fraud of the grossest character," and that the question as to whether the disposition of the lands operated as a diversion of the fund, in violation of the original grant, was not fully considered. The opinion also referred to the case of *Emigrant Co.* v. *County of Adams, supra,* and quoted a large part of the extract above given from the opinion in that case, and then added: "Upon further consideration of the whole subject, we are convinced that the suggestion then made, that the application of the proceeds of these lands to the purposes of the grant rests upon the good faith of the State, and that the State may exercise its discretion as to the disposal of them, is the only correct view. It is a matter between two sovereign powers, and one which private parties cannot bring into discussion. Swamp and overflowed lands are of little value to the government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas, the state governments, being concerned in their settlement and improvement, in the opening up of roads and other public works through them,
*190 in the promotion * of the public health by systems of drainage and embankment, are far more deeply interested in having the disposal and management of them. For these reasons, it was a wise measure on the art of Congress to cede these lands to the States in which they lay, subject to the disposal of their respective legislatures; and, although it is specially provided that the proceeds of such lands shall be applied, 'as far as necessary,' to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the States alone, when they accepted the grant; and whether faithfully performed or not is a question between the United States and the States; and is neither a trust following the lands nor a duty which private parties can enforce as against the State."

These views were confirmed in the case of *Hagar* v. *Reclamation District,* 111 U. S., 701, 713, at October Term, 1883, where it was said of the swamp-land act of 1850, that the appropriation of the proceeds of the sale of the lands rested solely in the good faith of the State; and that its discretion in disposing of them was not controlled by the condition mentioned in the act, as neither a contract nor a trust following the lands was thereby created.

In the case of *Louisiana* v. *United States,* 22 C. Cl. 284, the State of Louisiana sued the United States for claims arising under the 5 per cent act of 1811, and under the swamp-land acts of 1850 and 1855, and had a judgment for both claims, amounting to $71,385.83, which was affirmed by this court in *United States* v. *Louisiana,* 123 U. S. 32. In that case, the United States interposed the defence of the limitation of six years, as to the swamp-land claim. The Court of Claims held that the action of the Commissioner of the General Land Office, under § 2 of the act of 1855, in determining, on proof by the agent of the State, that any of the swamp land had, within the meaning of the act, been sold by the United States, so as to bring into force the requirement that the purchase money should be paid over to the State, was necessary to a right of action for the money on the part of the State, and that, as such action in
*191 that case did not occur more than * six years before the bringing of the suit, the limitation prescribed by § 1069 of the Revised Statutes did not apply. A set-off or counter-claim was interposed in that case by the United States, they alleging that the amount due by citizens of the State of Louisiana to the

United States for the direct tax levied by the act of August 5, 1861, 12 Stat. 292, was a proper subject of set-off against the claim of the State in the suit. This contention of the United States was overruled by the Court of Claims, on the ground that the State had never assumed the payment of the tax assessed under the act of 1861. On the appeal to this court by the United States, 123 U. S. 32, it was said in the opinion of the court delivered by Mr. Justice Field, that the statute of limitations did not seem to have any application to the demand arising upon the swamp-land acts; and that, as the Commissioner of the General Land Office had not found and certified the amount due to the State from the sales of swamp lands until the 30th of June, 1885, and the suit was commenced in September, 1886, the limitation of the statute did not apply to the case. It was further held, that the State was not liable for the taxes assessed under the act of August 5, 1861, against the real property of private individuals in the State, and that the Court of Claims had jurisdiction of the action. Therefore, the judgment was affirmed.

In accordance with the views of this court in the cases above cited, it must be held that the proceeds of the swamp lands are not subject to a property trust, either in the hands of the United States or in those of the State, in such sense that the claim of the United States upon the State for the overdue coupons on the Indian Trust bonds, involved in the present case, cannot be set-off against the claim of the State to the swamp-land fund.

Under the act of 1850, the swamp lands are to be conveyed to the State as an absolute gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. The judgment of the State as to the necessity is paramount, and any application of the proceeds by the
*192 State to any other object is to be taken as * the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary. By the 2d section of the act of 1855, it is provided that the purchase money received by the United States for the swamp lands sold by them shall be paid over to the State. There is nothing in these provisions of the character of a property trust, and nothing to prevent the application by the State of the swamp-land fund to general purposes. If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress and not in the court.

The same views apply to the provision as to the 5 per cent fund, in the act of 1811, that it shall be applied to laying out and constructing public roads and levees in the State, "as the legislature thereof may direct;" and as to both the 5 per cent fund and the swamp-land fund, we are of opinion that neither of them is of such a character that the debt due to the United States by the State of Louisiana, for the overdue coupons on the Indian Trust bonds, cannot be set off against the fund which is in the hands of the United States. This being so, it follows that the limitation of § 1069 of the Revised Statutes is a bar against the recovery of the item of $13,602.71 of the 5 per cent fund, credited May 8, 1879, and that the amount of the set-off of $31,080, for coupons falling due up to November 1, 1887, on the Indian Trust bonds, is a valid set-off against the remaining $29,970, and is more than sufficient to extinguish that item.

It results from these views that

The judgment of the Court of Claims must be reversed, and the case be remanded to that court, with a direction to enter a judgment in favor of the United States.

United States v. State of North Carolina.

Supreme Court of the United States, 1890.

[136 *United States*, 211.]

A State is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by a lawful contract of its executive officers.

On bonds of the State of North Carolina, expressed to be redeemable on a day certain at a bank in the city of New York, with interest at the rate of six per cent a year, payable half-yearly "from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed;" and issued by the Governor and Treasurer of the State under the statute of December 22, 1852, c. 10, which provides that the principal of such bonds shall be made payable on a day named therein, that coupons of interest shall be attached thereto, and that both bonds and coupons shall be made payable at some bank or place in the city of New York, or at the public treasury in the capital of the State, and makes no mention of interest after the date at which the principal is payable; the State is not liable to pay interest after that date.

*212 * This was an action of debt, brought in this court, on November 5, 1889, by the United States against the State of North Carolina, upon one hundred and forty-seven bonds under the seal of the State, signed by the Governor, and countersigned by the Public Treasurer, for one thousand dollars each, payable in thirty years from date, with interest at the yearly rate of six per cent, alleged in the declaration to be payable half-yearly until payment of the principal; nineteen of the bonds, dated January 1, 1854, and payable January 1, 1884, and seven bonds dated January 1, 1855, and payable January 1, 1885, issued under the statutes of North Carolina of January 27, 1849, and December 22 and 27, 1852; and the remaining one hundred and twenty-one bonds, dated April 1, 1855, and payable April 1, 1885, issued under the statute of North Carolina of February 14, 1855; and all these bonds, differing only in date of execution and in day of payment, being in the following form:

"It is hereby certified that the State of North Carolina justly owes to the North Carolina Railroad Company or bearer one thousand dollars, redeemable in good and lawful money of the United States at the Bank of the Republic, in the city of New York, on the first day of January, 1884, with interest thereon at the rate of six per cent per annum, payable half-yearly at the said bank on the first days of January and July of each year, from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed.

"In witness whereof the Governor of the said State, in virtue of the power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and her Public Treasurer hath countersigned the same, this first day of January, 1854."

The material provisions of the statutes under which the bonds were issued are copied in the margin.[1]

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[1]The act of January 27, 1849, c. 82, entitled "An act to incorporate the North Carolina Railroad Company," contains the following provisions:

"Sec. 36. That whenever it shall appear to the Board of Internal Improvements of this State, by a certificate, under the seal of said company, signed by their treasurer and countersigned by their president, that one-third have been subscribed for and taken, and that at least five hundred thousand dollars of said stock has been actually paid into the hands of said treasurer of said company, the said Board of Internal Improvements shall

*213 * The declaration alleged that, at the dates when the bonds became
*214 payable, payment of the principal was demanded by * the United States and refused by the State of North Carolina.

*215 The State of North Carolina pleaded payment of the principal * sums of the bonds after they became payable, together with all interest accrued thereon to the days when they became payable.

The United States moved for judgment, as by *nil dicit,* because the plea did not answer so much of their demand as was for interest after the bonds became payable.

The case was submitted to the decision of the court upon a case stated, signed by the Attorney General of the United States, and by the Attorney General of North Carolina, as follows:

"The parties to the above-entitled case stipulate that upon the issue joined the facts are that payment of the bonds was demanded and refused at the several times in the years 1884 and 1885 in the declaration alleged; but subsequently, upon or about the 2d day of October, 1889, all coupons upon the bonds were paid, and that, besides, $147,000 was paid upon account of whatever might then remain due upon the bonds; the United States then contending that because of interest at six per cent per annum, which at that time had accrued upon the principal of the bonds since their maturity, such payment left still unpaid upon the debt the sum of $41,280; whilst the State then contended that no interest had accrued upon the principal of the bonds after their maturity, and therefore that such payment was in full of such debt.

"The parties submit to the court that, in case as matter of law the principal of said bonds did so bear interest after maturity, judgment is to be entered for the plaintiff for $41,280; but that if it did not so bear interest, judgment is to be entered for the defendant."

*216 * *Mr. Attorney General* (with whom was *Mr. S. F. Phillips, Mr. J. G. Zachry* and *Mr. F. D. McKenney* on the brief) for plaintiff.

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be and they are hereby authorized and required to subscribe, on behalf of the State, for stock in said company to the amount of two millions of dollars to the capital stock of said company; and the subscription shall be paid in the following manner, to wit, the one-fourth part as soon as the said company shall commence work, and one-fourth thereof every six months thereafter, until the whole subscription in behalf of the State shall be paid: Provided, the treasurer and president of said company shall, before they receive the aforesaid instalments, satisfactorily assure the Board of Internal Improvements, by their certificates, under the seal of said company, that an amount of the private subscription has been paid in equal proportion to the stock subscribed by the State.

"Sec. 37. That if in case the present legislature shall not provide the necessary and ample means to pay the aforesaid instalments on the stock subscribed for on behalf of the State, as provided for in the thirty-sixth section of this act, and in that event, the Board of Internal Improvements aforesaid shall, and they are hereby authorized and empowered to borrow, on the credit of the State, not exceeding two millions of dollars, as the same may be needed by the requirements of this act.

"Sec. 38. That if in case it shall become necessary to borrow the money by this act authorized, the Public Treasurer shall issue the necessary certificates, signed by himself and countersigned by the Comptroller, in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually at such times and places as the Treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued; but no greater amount of such certificates shall be issued at any one time than may be sufficient to meet the instalment required to be paid by the State at that time.

"Sec. 39. That the Comptroller shall register the said certificates at large in a book

Mr. T. F. Davidson, Attorney General of the State of North Carolina, and *Mr. S. G. Ryan* for defendant.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

This is an action brought in this court by the United States against the State of North Carolina upon bonds issued by the State and held by the United States. By the case stated, it appears that the State, some time after the maturity of the bonds, paid the principal, together with interest thereon to the time when the bonds became payable; and the only question presented for our decision is whether, as a matter of law, the principal of the bonds bore interest after maturity, and according to our opinion upon this question judgment is to be entered for the one party or the other.

Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman,* 98 U. S. 565; *Angarica* v. *Bayard,* 127 U. S. 251, 260, and authorities there collected; *In re Gosman,* 17 Ch. D. 771.

In *Gosman's Case,* just cited, where the personal property of a deceased person had been taken possession of by the Crown for want of known next of kin, and was afterwards recovered by petition of right by persons proved to be the next of kin, who claimed interest for the time the Crown held the property, Sir George Jessel, Master of the Rolls, speaking for the Court of Appeal, summed up the law of England in this short judgment: "There is no ground

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to be by him kept for that purpose, at the time he countersigns the same."

"Sec. 41. That, as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof; and, in addition thereto, all the stock held by the State in the North Carolina Railroad Company hereby created shall be, and the same is hereby, pledged for that purpose; and any dividends of profits which may, from time to time, be declared on the stock held by the State as aforesaid, shall be applied to the payment of the interest accruing on said certificates; but until such dividends of profit may be declared, it shall be the duty of the Treasurer, and he is hereby authorized and directed to pay all such interest, as the same may accrue, out of any moneys in the Treasury not otherwise appropriated.

"Sec. 42. That the certificates of debt, hereby authorized to be issued, shall be transferable by the holders thereof, their agents or attorneys, properly constituted, in a book to be kept by the Public Treasurer for that purpose; and in every instance, where a transfer is made, the outstanding certificate shall be surrendered and given up to the Public Treasurer, and by him cancelled, and a new one, for the same amount, issued in its place to the person to whom the same is transferred." Laws of North Carolina of 1848-49, pp. 153, 154, 155.

The act of December 22, 1852, c. 10, entitled "An act to regulate the form of bonds issued by the State," contains the following provisions:

"Sec. 1. That all certificates hereafter to be issued for any money to be borrowed for the State, by virtue of any act now in force authorizing the same, or of any act which may be hereafter passed for that purpose, shall be signed by the Governor and countersigned by the Public Treasurer, and sealed with the great seal of the State, and shall be made payable to ——— or bearer; and the principal shall be made payable by the State at a day named in the certificate or bond; and coupons of interest in such form as may be prescribed by the Public Treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto shall be made payable at such bank or place in the city

for charging the Crown with interest. Interest is only payable by statute or by contract."

*217 * In *United States* v. *Sherman,* the Circuit Court of the United States for the District of South Carolina had certified that there was probable cause for an act done by an officer of the United States, for which judgment had been recovered against him in that court; and consequently, by express acts of Congress, "the amount so recovered" was to "be provided for and paid out of the proper appropriation from the treasury." Acts of March 3, 1863, c. 76, § 12, 12 Stat. 741; July 28, 1866, c. 298, § 8, 14 Stat. 329. This court held that the judgment creditor was entitled to receive from the United States the amount of the judgment only, without interest; and Mr. Justice Strong, in delivering the opinion, said: "When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government; but not until then. Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government; and the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes." 98 U. S. 567, 568.

In *Angarica* v. *Bayard,* this court held that on money received by the Secretary of State from a foreign government under an international award, invested by him in interest-bearing securities of the United States, and ultimately paid to the petitioner, interest was not payable, because the money was in effect withheld by the United States; and Mr. Justice Blatchford, delivering judgment, said:

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of New York as he, the Public Treasurer, may think proper, or at the office of the Public Treasury at Raleigh, if preferred by the purchaser; Provided, however, that no such certificate shall be issued for a less sum than one thousand dollars, and no certificate shall be sold for a less sum than par value.

"Sec. 2. That it shall be the duty of the Public Treasurer to enter in a book, to be kept for that purpose, a memorandum of each bond or certificate, issued by virtue of this act, the numbers, date of issue, when and where payable, to whom issued, or to whom sold, and at what premium, if any, the same was sold by him." Laws of North Carolina of 1852, pp. 45, 46.

By the act of December 27, 1852, c. 9, entitled "An act to increase the revenue of the State by the sale of its bonds," "it shall be the duty of the Public Treasurer to have coupons attached to all the bonds of the State hereafter sold by him." Laws of North Carolina of 1852, p. 45.

The act of February 14, 1855, c. 32, entitled "An act for the completion of the North Carolina Railroad," contains the following:

"Sec. 1. That the Public Treasurer is authorized and instructed to subscribe, in behalf of the State, for ten thousand additional shares of capital stock in the North Carolina Railroad Company, and that he make payment for said stock, by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized that were given for those issued under the direction of said act: Provided, nevertheless, that the whole amount of principal money of such bonds or certificates of debt shall not exceed the sum of one million of dollars." Laws of North Carolina of 1854-55, p. 64.

"The case, therefore, falls within the well settled principle that the United
*218 States * are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration, or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages." 127 U. S. 260.

In *United States* v. *McKee,* where a claim against the United States for moneys and supplies furnished during the Revolutionary War had been referred by Congress to the Court of Claims with directions to be governed in its adjustment and settlement "by the rules and regulations heretofore adopted by the United States in the settlement of like cases," interest was allowed by that court, and by this court on appeal, because Congress was shown to have allowed interest in many private acts for the settlement of similar claims. 10 C. Cl. 231, 235; 91 U. S. 442, 451.

In *United States* v. *Bank of Metropolis,* 15 Pet. 377, cited at the bar, no question of interest was suggested by counsel, or considered by the court.

In North Carolina, as elsewhere, in an action against a private person, to recover a sum certain and overdue, interest may doubtless be recovered, either according to the dictum in *Devereaux* v. *Burgwin,* 11 Iredell, 490, 495, on the ground of a "promise to pay being implied from the nature of the transaction;" or, as more accurately stated in other cases, as damages for nonperformance of the defendant's contract. *State* v. *Blount,* 1 Haywood, 4; *Hunt* v. *Jucks,* 1 Haywood, 173; *McKinlay* v. *Blackledge,* 2 Haywood, 28. See *Young* v. *Godbe,* 15 Wall. 562, 565; *Holden* v. *Trust Co.,* 100 U. S. 72, 74; *Price* v. *Great Western Railway,* 16 M. & W. 244, 248; *Cook* v. *Fowler,* L. R. 7 H. L. 27, 32, 36, 37; *Union Institution for Savings* v. *Boston,* 129 Mass. 82.

*219 But it is equally well settled, by judgments of the Supreme * Court of North Carolina, that the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid.

In *Attorney General* v. *Cape Fear Navigation Co.,* 2 Iredell Eq. 444, 454, decided in 1843, in a suit on behalf of the State to recover dividends due to it as a stockholder, the corporation, by way of set-off, claimed interest for the State's failure to pay its subscription at the time when it was payable; and Chief Justice Ruffin, in delivering judgment, laid down, as undoubted law, that "the general rule is, that the State never pays interest, unless she expressly engages to do so."

In *Bledsoe* v. *State,* 64 No. Car. 392, 397, decided in 1869, under a clause in the Constitution of the State providing that "the Supreme Court shall have original jurisdiction to hear claims against the State; but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next General Assembly for its action;" a claim was made for fuel and provisions furnished to the State Insane Asylum, under written contract of the superintendent, from October, 1863, to April, 1865, with interest from the times of delivery. Upon the question of interest, the court said: "It was decided by this court, in *Attorney General* v. *Cape Fear Navigation Co.,* 2

Iredell Eq. 444, that the State is not bound to pay interest, unless there is a special contract to that effect. The contract, in this case, must be understood to have been made with reference to the law, as it then stood. But because of the changes in and the disturbed condition of the government, and because payment has been delayed for a long time, we recommend a departure from the rule, so far as to allow interest from the end of the war, say May 1, 1865, until January 1, 1869, when the plaintiff presented his claim to the General Assembly."

Whether interest not stipulated for in a contract is to be awarded as damages for nonperformance of the contract, or on the ground of an implied promise to pay it, a private person is no less chargeable with interest on debts cer-
*220 tain and overdue for money or goods, than on promissory notes or * bonds obligatory; and the State is no more chargeable with interest in the one case than in the other.

The scope and effect of the bonds now sued on cannot be determined without a careful consideration of the provisions of the statutes from which the officers who executed the bonds derived their authority.

Under the original act of January 27, 1849, the obligations of the State for money borrowed were required to be signed by the Treasurer and countersigned by the Comptroller, "in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually at such times and places as the Treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued."

There is nothing in that statute to show that certificates issued under it are to be negotiable from hand to hand, or assignable by the mere act of the holder, so as to create a contract between the State and any assignee. On the contrary, the statute requires that they shall be registered at large by the Comptroller at the time of his countersigning them; and the only transfer provided for is on the books of the Treasurer, and by surrender of the old certificate and issue of a new one instead thereof to the assignee.

In that act, as no other date is mentioned for the payment of the principal than the date at which it "shall be redeemable," it would be difficult (as is admitted by the learned counsel for the United States, citing *Vermilye* v. *Adams Express Co.*, 21 Wall. 138, 145) to attribute to the word "redeemable" any other meaning than "payable;" and the provision that the interest shall be "payable semi-annually at such times and places as the Treasurer may appoint," naturally relates to interest before the date fixed for payment of the principal, and could hardly be extended to imply an authority to the Treasurer and the Comptroller to bind the State to pay interest after that date.

But any doubt upon this point is removed by the act of December
*221 * 22, 1852, pursuant to the provisions of which the bonds in suit were issued.

This act makes new requirements, differing in many respects from, and in so far superseding, the requirements of the former act. It requires all certificates, thereafter issued for money borrowed by the State, to be under seal of the State signed by the Governor and countersigned by the Treasurer. It clearly shows that they are to be negotiable, as well by requiring them to "be made

payable to ——— or bearer," as by requiring a registry of a memorandum of their original issue only. It omits the provision that the principal "shall be redeemable" at the end of thirty years, and instead thereof prescribes that "the principal shall be made payable by the State at a day named in the certificate or bond." It requires "coupons of interest to be attached to the certificates;" and both the certificates and the coupons are required to be made payable, either at such bank or place in the city of New York as the Treasurer may designate, or at the public treasury in Raleigh, if preferred by the purchaser.

From the general principle, that an obligation of the State to pay interest, whether as interest or as damages, on any debt overdue, cannot arise except by the consent and contract of the State, manifested by statute, or in a form authorized by statute, it appears to us to follow as a necessary consequence that no authority to the officers of the State to bind it by such an obligation can be implied from the act of 1852, requiring the certificates or bonds issued under it to be made payable at a day named in them, and to have coupons of interest attached to them, and making no mention whatever of interest after the date at which the principal is payable.

In the light of the provisions of this statute, the agreement in the bonds sued on, that the principal sum shall be "redeemable in good and lawful money" at the place and day therein designated, must be deemed equivalent to an agreement that they shall be payable on that day; and if the further provision by which interest is payable half-yearly "from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed," could, upon
*222 the face of * the bonds, and without regard to the laws under which they were issued, be construed to include interest after the date at which the principal is payable, and for which interest there were no coupons to be surrendered, it cannot be allowed such an effect, because the State of North Carolina has never authorized its officers to incur any such obligation in its behalf.

This disposes of all the suggestions made in behalf of the United States, except the argument that, the bonds being payable in New York, the payment of interest is to be governed by the law of New York, according to which it is said that the State would be liable to pay interest, like a private person. *People* v. *Canal Commissioners,* 5 Denio, 401.

But these bonds are obligations of the State of North Carolina; they were executed, delivered and registered in North Carolina by high officers of the State; the rate of annual interest is fixed at six per cent, the legal rate in North Carolina, and not seven per cent, the then legal rate in New York; and the fact that the bonds were made payable at a particular bank in New York, pursuant to the authority conferred by the statute of North Carolina upon its Public Treasurer, instead of being made payable, as by that statute they might have been, at Raleigh, the capital of the State, cannot affect the extent of the obligation of the State of North Carolina. The manifest object of the alternative, allowed by the statute, of making the bonds payable either at New York or at Raleigh, was to promote the convenience of bondholders; and not to submit the obligation, the construction or the effect of the bonds to the operation of different laws, according to the place at which they should actually be made payable. The case, therefore, falls within the general rule, well established in this court, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they are made, unless the contracting parties appear

to have had some other place in view. *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 453. *Judgment for the defendant.*

Mr. Justice Miller, Mr. Justice Field and Mr. Justice Harlan dissented.

State of Indiana v. State of Kentucky.

Supreme Court of the United States, 1890.

[136 *United States*, 479.]

The waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

The dominion and jurisdiction of a State, bounded by a river, continue as they existed at the time when it was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

Long acquiescence by one State in the possession of territory by another State, and in the exercise of sovereignty and dominion over it, is conclusive of the title and rightful authority of the latter State.

In equity, to settle and determine the boundary line between the States of Indiana and Kentucky.

On the 20th day of December, 1783, the legislature of Virginia by statute authorized and empowered the delegates of the State in the Congress of the United States "for and on behalf of this State, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign and make over unto the United States, in Congress assembled, for the benefit of the said States, all right, title and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio."

On the 1st of March, 1784, the delegates from that State in Congress executed and delivered to "the United States in Congress assembled" a deed of "all right, title and claim, as well of soil as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio." This deed was, on the same day, accepted by Congress, and was spread at length upon its records.

*480 * On the 13th of July, 1787, Congress enacted an ordinance which was entitled "*An ordinance for the government of the territory of the United States northwest of the river Ohio.*" There were no words of description in this ordinance except those contained in its title.

In 1788 the legislature of Virginia, by an act which recited the passage of this ordinance, enacted: "that the afore-recited article of compact between the original States and the people and States in the territory northwest of Ohio river be, and the same is hereby, ratified and confirmed, anything to the contrary in the deed of cession of the said territory by this Commonwealth to the United States notwithstanding."

The first Congress assembled under the Constitution enacted, on the 7th August, 1789, *"An act to provide for the government of the territory northwest of the river Ohio."* These words of description were repeated in the act; but there were no other words of description. 1 Stat. 50.

On the 18th December, 1789, the legislature of Virginia passed an act consenting "that the district of Kentucky, within the jurisdiction of said Commonwealth, and according to its actual boundaries at that time, should be formed into a new State." By that act it was further provided that "the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth, lies therein, shall be free and common to the citizens of the United States; and the respective jurisdictions of this Commonwealth and of the proposed State, on the river aforesaid, shall be concurrent only with the States which shall possess the opposite shores of the said river."

On the 26th May, 1790, Congress established a territorial government over "the territory of the United States south of the river Ohio;" 1 Stat. 123; but on the 4th of February, 1791, 1 Stat. 189, it gave its consent to the admission of Kentucky into the Union, "according to its actual boundaries on the 18th day of December, 1789," the date of the passage of the act of the legislature of Virginia.

On the 7th May, 1800, an act was passed "to divide the
*481 * territory of the United States northwest of the Ohio into two separate governments." 2 Stat. 58.

On the 30th April, 1802, the enabling act for the admission of Ohio was passed, the Ohio River being made the southern boundary. 2 Stat. 173. By this act everything west of the present boundary of Ohio, and east of the division line established by the act of 1800 was "made a part of the Indiana Territory."

On the 3d February, 1809, the Territory of Illinois was separated from the Territory of Indiana, the Wabash River being the boundary. 2 Stat. 514. And, on the 19th April, 1816, the enabling act for Indiana was passed, in which it was enacted that the State should be bounded "on the south by the river Ohio, from the mouth of the Great Miami River to the mouth of the river Wabash." 3 Stat. 289.

The controversy in this case related to the jurisdiction over the Green River Island, a formation in the river on the Indiana side opposite the mouth of the Green River, entering the Ohio from Kentucky; and the claims of Indiana in respect to it are fully stated in the brief and argument of its counsel. Some of the main issues were issues of fact, concerning which there was a large amount of proof. No good purpose can be served by further reference to it.

An act passed by the legislature of Kentucky in 1873, and an Indiana statute following it in 1875 and the proceedings under the latter were relied upon by the State of Kentucky. These acts are printed in the margin.[1]

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[1]"An Act to fix and determine the boundary line between the States of Indiana and Kentucky above and near Evansville.

"Whereas, Difficulty has arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between said States, and [said] difficulty involves the title to large tracts of land at or near the line between Green River Island and the State of Indiana; therefore,

"Be [it] enacted by the General Assembly of the Commonwealth of Kentucky.

"§ 1. That the Governor of the State be, and is hereby empowered and directed, to select a commissioner, who shall be a resident of Kentucky, and a practical surveyor, who shall

*482 * *Mr. Alpheus H. Snow* and *Mr. Joseph E. McDonald* (with whom was *Mr. John M. Butler* on the brief) for the State of Indiana.

*483 * From a point on the northwest side of the Ohio River, about six miles above the city of Evansville, Indiana, to a point on the same side of the river about one-half mile above that city, the Ohio River curves toward Kentucky. Between these same points a depression or bayou exists which lies on nearly a straight line from one point to the other. The bottom of this depression is at present from twenty to thirty feet above low-water mark of the Ohio River.

There are some evidences that near the upper point, this depression, *484 at some past period, divided into two at the river's * edge, thus leaving a delta between the two depressions. Opposite the upper point, on the south (Kentucky) side of the Ohio River, the Green River flows into the Ohio.

The land lying between the depression and the Ohio River consists of two connected tracts, one called the "Green River Island" and the other the "Green River Island Tow-head,"—the latter being a tract formed by deposit which has within the last twenty or thirty years become attached to the "Green River Island" tract at all stages of water.

The land lying in the delta of the depression northeast of the "Green River Island" tract is called "Buck Island." The depression or bayou above referred to is called the "Green River Island Bayou."

Until the year 1875, it was generally supposed, in the vicinage, that the boundary line between the two States was the low-water mark of the Ohio River on its northwest side, but it was claimed by persons who purported to assert the claims of the State of Kentucky that the low-water mark of the Ohio River on the northwest side was the middle line of the "Green River Island Bayou," and of its northern branch at the point where the bayou divided, and that hence such middle line of the bayou was the boundary line between the two States.

A few persons who claimed under the State of Kentucky, and whose title deeds bounded their land at the state boundary line, claimed that the meander line of the United States survey of 1806, which ran along the top of the north (Indiana) bank of the "Green River Island Bayou," and upon the north (Indiana) bank of the north branch of the bayou where it divided, was the state boundary line.

In the year 1875 a survey was made for the purpose of locating the state boundary line between the two points, above referred to, by commissioners of the two States, under peculiar circumstances hereafter to be discussed. This survey located the state boundary line upon the meander line of the United States survey of 1806.

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act with a similar person selected by the Governor of the State of Indiana, and such persons so selected shall make a survey of the line dividing said States, beginning at the head of the island known as Green River Island opposite, or nearly so, from the mouth of Green River; running thence in a direction down the Ohio River to the lower end of said island, upon a line dividing said island and the State of Kentucky from the State of Indiana. Said commissioners shall consult the surveys originally made by the United State government, if there be more than one, and they be not inconsistent with each other, and said commissioners shall be governed in running said line by such survey or surveys made by the Government of the United States. Within ten days after such survey, said commissioners shall reduce said survey to writing, causing the metes and bounds and landmarks to be particularly described, and sign the same, and acknowledge the same before any officer authorized to take acknowledgments of deeds, and duplicates of such written statements of survey, signed and acknowledged by the commissioners, shall be filed in the office of the clerk of the Henderson County Court, and in the auditor's office of Vanderburgh, and Warrick counties, Indiana; and such written statement, or a copy duly certified by the clerk of the said Henderson County Court, shall be conclusive evidence of the said line dividing said island, so called, from said State of Indiana, in any of the courts of this

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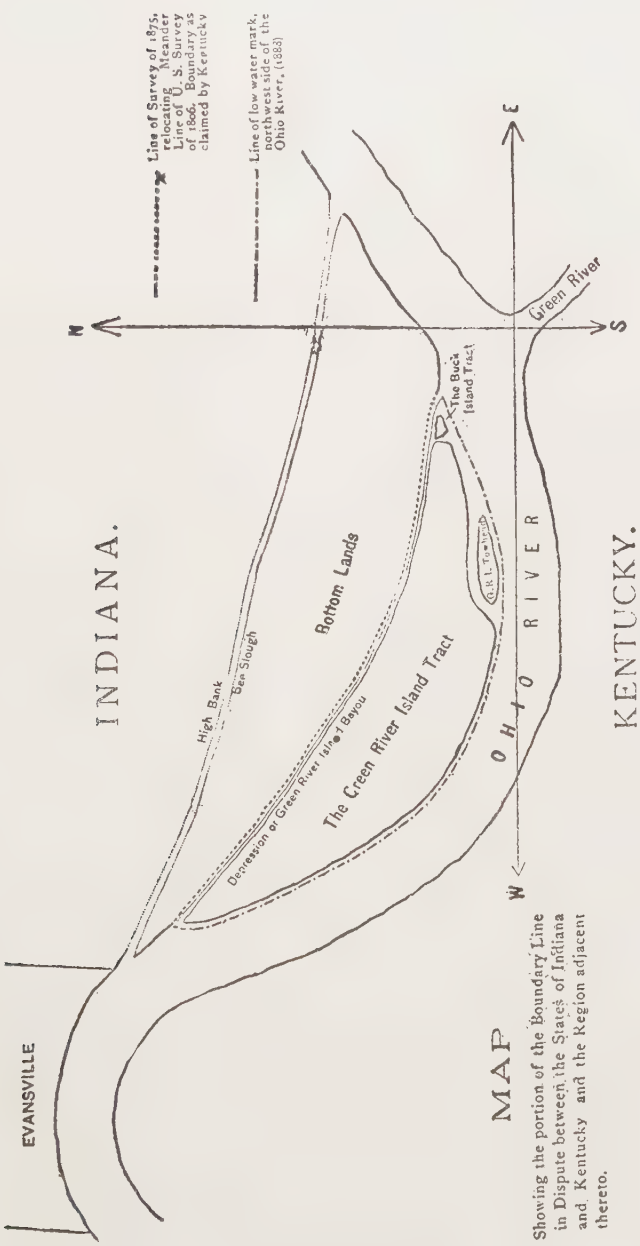
Line of Survey of 1875, relocating Meander Line of U. S. Survey of 1806. Boundary as claimed by Kentucky
Line of low water mark, northwest side of the Ohio River, (1888)
N
S
E
W
Green River
The Buck Island Tract
INDIANA.
KENTUCKY.
Bottom Lands
High Bank
Sea Slough
Depression or Green River Island Bayou
The Green River Island Tract
O H I O R I V E R
EVANSVILLE

MAP

Showing the portion of the Boundary Line in Dispute between the States of Indiana and Kentucky and the Region adjacent thereto.

The "Green River Island" tract is about five and one-half miles long,
*486 and a little over a mile wide at its greatest width, * and tapers to a point at both ends. It contains nearly two thousand acres of land. The "Green River Island Tow-head" contains about one hundred acres. The "Buck Island" tract contains about fourteen acres. The narrow strip of land between the bayou and the line of the survey of 1875 contains about one hundred acres. The land is worth on the average fifty dollars an acre.

The owners of the land on the "Green River Island" tract deriving title from Virginia and Kentucky had, prior to 1875, been in dispute and conflict with the owners of the adjacent land in Indiana, deriving title from the United States, over the ownership of "Buck Island." After the survey of 1875, the trouble was much increased, on account of the doubtful state in which the title to the strip between the bayou and the line of the survey of 1875 was left.

Inasmuch as these disputes and conflicts had their origin in a dispute as to

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State.

"§ 2. The commissioners to be appointed under this act shall report to the Governor, in writing, the result of the survey together with a plat of the same; and when said survey shall have been completed, the commissioner shall file his account with the Governor, and when the same shall be examined and approved by him, the Auditor of Public Accounts is hereby authorized to draw his warrant on the Treasury for said amount in favor of the commissioner appointed: *Provided, however,* said amount shall not exceed the sum of two hundred and fifty dollars.

"§ 3. This act shall take effect and be in force from its passage. Approved April 21, 1873." 1 Sess. Laws 1873, 51, c. 964.

The statute of the State of Indiana of February 27, 1875, referred to in the cross-bill was as follows:

"An Act to ascertain the location of the boundary line between the States of Indiana and Kentucky, above and near Evansville, and making the same evidence in any dispute, and declaring an emergency. (Approved February 27, 1875.)

"Whereas, Difficulty and dispute have arisen between the owners of land in Indiana and Kentucky, in regard to the boundary line between said States, and said difficulty involves the title to large tracts of land above, near the line between the Green River Island and the State of Indiana:

"Section 1. *Be it enacted by the General Assembly of the State of Indiana,* that the Governor be and is hereby empowered and directed to select a commissioner, who shall be a resident of the State of Indiana and a practical surveyor, who shall act with a similar commissioner to be appointed by the Governor of the State of Kentucky, and the two commissioners so selected, shall make a survey of the line dividing said States, beginning at the head of said Green River Island, near and opposite to the mouth of Green River, and running thence down the Ohio River to the lower end of said island.

"Sec. 2. In running said line the said commissioners shall consult and be governed by the surveys originally made by the government of the United States, when such surveys are not inconsistent with each other, and they shall establish and mark proper monuments along said line, whereby the same may be plainly indicated and perpetuated.

"Sec. 3. Within ten days after making such survey and establishing said line, said commissioners shall reduce the same to writing, giving a full and plain description of all the courses and distances, and of the marks and monuments made and established, and sign and acknowledge the same before some officer authorized to take acknowledgements of deeds, which writing, so acknowledged, shall be recorded in the Recorder's office in the counties of Vanderburgh and Warrick, and the original filed in the office of the Secretary of State, and such writing, or the record thereof, shall be conclusive evidence in any of the courts of this State of the boundary line between the States of Indiana and Kentucky, between the points on said Green River Island heretofore indicated.

"Sec. 4. There is hereby appropriated out of the moneys of the State, in the hands of the Treasurer, a sum not exceeding two hundred and fifty dollars, to pay for making said survey. After rendering the services provided for in this act, the commissioners shall make proof to the judge of the Circuit Court of Vanderburgh County of the value thereof, to which the said judge shall certify and upon the presentation of such certificate, the Auditor of the State shall draw his warrant in favor of said commissioner for amount so certified not exceeding the said sum of two hundred and fifty dollars.

"Sec. 5. *Whereas,* An emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage."

the state boundary, the State of Indiana, after having attempted to settle the boundary line by agreement with the State of Kentucky and failed, brought this suit for the purpose of obtaining a final settlement of all disputes by having the location of the state boundary line between the two points above referred to authoritatively settled.

I. Do the words "Lying and being to the northwest of the river Ohio" in the act of cession of 1783 from Virginia to the United States, and the words "on the south by the Ohio River" in the act of Congress of 1816 providing for the formation of the State of Indiana, fix the southern boundary at the middle line of the Ohio River, or on the north or the south side of the Ohio River? and if on either the north or south side of the Ohio River, at the line of high-water mark, medium water mark or low-water mark?

In the year 1820, the case of *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, was brought in this court from the Circuit Court of the United States for the District of Kentucky. That case was an action of ejectment, in which the plaintiff claimed under a grant from the State of Kentucky and the defendants under a
*487 grant from the United States. The title * of the individuals who were parties in that action depended, as Chief Justice Marshall, who delivered the opinion of the court, states, "upon the question whether the lands lie in the State of Kentucky or in the State of Indiana." The land in question in that case was land lying north of the main Ohio River, and between the main river and a bayou which was dry during a portion of the year.

The question involved in that case, so far as the boundary line between the States was concerned, was whether the boundary line between the States was or was not at the medium water mark on the northwest side of the Ohio River. There was no claim that the boundary line was north of the medium water mark on the northwest side, and consequently it was entirely immaterial whether the boundary line went to low-water mark on the northwest side or to the middle line of the river, or to low-water mark on the southeast side. If the boundary line was south of the medium water mark on the northwest side, the land was necessarily in Indiana, whether the boundary line was at low-water mark on either side or at the middle line of the Ohio River.

The court however in that case entered into an inquiry as to the construction of the act and deed of cession of the Northwest Territory and arrived at the conclusion that the boundary between the States was the low-water mark on the northwest side of the Ohio River. The argument of Chief Justice Marshall is shown by the following quotations:

" . . . It is not the bank of the river, but the river itself at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying and being to the northwest of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent States. These States, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and, in establishing it, Virginia must have had in view the convenience of the future population of the country.

"When a great river is the boundary between two nations or States,
*488 if the original property is in neither, and there be * no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domains, and the newly created State extends to the river only. The river, however, is its boundary."

"If instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low-water

mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual than where it is diurnal. Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark.

"When the State of Virginia made the Ohio the boundary of States, she must have intended the great river Ohio, and not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side, would result from attaching to Kentucky, the State on its southeastern border, a body of land lying northwest of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above low-water mark.

"The case is certainly not without its difficulties; but in the great questions, which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, we think the great object, when it can be distinctly perceived,
*489 ought not to be defeated by those technical * perplexities which may sometimes influence contracts between individuals. The State of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia, which is now Kentucky, became a separate State, the river was the boundary between the new States, erected by Congress in the ceded territory, and Kentucky. Those principles and considerations which produced the boundary ought to preserve it. They seem to us to require that Kentucky should not pass the main river and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel."

From what has been said above, it is evident that the conclusion of this court, in the case of *Handly's Lessee* v. *Anthony,* above referred to, relating to the state boundary line, is a *dictum,* and that it is, therefore, open to this court to decide whether the boundary line between these States extends along the middle line of the Ohio River or along the line of high-water mark, medium water mark or low-water mark on the northwestern side or the southeastern side.

There have been few cases in the state courts in which the exact location of the boundary of the States northwest and southeast of the Ohio River has been a material question.

The question has been considered in the state courts, and the following may be said to be the result of the decisions:

The Kentucky courts have always claimed, under the authority of *Handly's Lessee* v. *Anthony,* to the low-water mark on the northwest side of the Ohio River. *Fleming* v. *Kenney,* 4 J. J. Marsh. 155; *Church* v. *Chambers,* 3 Dana, 274; *McFall* v. *Commonwealth,* 2 Met. (Ky.) 394; *McFarland* v. *Knight,* 6 B. Mon. 500.

In Indiana the authority of *Handly's Lessee* v. *Anthony* is recognized as applicable to the boundaries of riparian owners, but the right of wharfing out into the Ohio River is insisted upon. *Stinson* v. *Butler,* 4 Blackford, 285; *Cowden* v.

Kerr, 6 Blackford, 280; *Doe* v. *Hildreth,* 2 Indiana, 274; *Commissioners*
*490 *of St. Joseph County* v. *Pidge,* 5 Indiana, 13; * *Bainbridge* v. *Sherlock,* 29 Indiana, 364; *S. C.* 95 Am. Dec., 644; *Gentile* v. *State,* 29 Indiana, 409; *Carlisle* v. *State,* 32 Indiana, 55; *Martin* v. *Evansville,* 32 Indiana, 85; *Sherlock* v. *Bainbridge,* 41 Indiana, 35; *Sherlock* v. *Alling,* 44 Indiana, 184.

The same may be said of the courts of Illinois, though there is a strong tendency to claim to the middle of all rivers. *Middleton* v. *Pritchard,* 3 Scammon, 510; *S. C.* 38 Am. Dec. 112; *Ensminger* v. *People,* 47 Illinois, 384; *S. C.* 95 Am. Dec. 495; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535; *Fuller* v. *Dauphin,* 124 Illinois, 542.

In Ohio and Virginia the question has been hotly discussed, and the authority of *Handly's Lessee* v. *Anthony* denied.

Virginia was dissatisfied with the case of *Handly's Lessee* v. *Anthony* because she claimed to high-water mark on the northwest side of the river; Ohio, because she claimed to the middle of the river. See *Commonwealth* v. *Garner,* 3 Grattan, 655; *Benner's Lessee* v. *Platter,* 6 Ohio, 505; *Covington & Cincinnati Bridge Co.* v. *Mayer,* 31 Ohio St. 317; *St. Joseph &c. Railroad* v. *Devereaux,* 41 Fed. Rep. 14.

The conclusion of Chief Justice Marshall is based upon the theory that the act and deed of cession of Virginia are to be treated as a grant of the undisputed territory of Virginia, and that the words "to the northwest of the river Ohio," are to be construed as though they were the words of strict boundary rather than of governmental description. He admits that his construction is not without difficulty, and the words are plainly ambiguous.

An examination of the circumstances under which the cession was made establishes that:

1. The words "to the northwest of the river Ohio" in the act and deed of cession of Virginia are not words of boundary, since the territory had not at that time any determinate bounds on the north.

2. These words were used in the previous statutes of Virginia, and in the common and official speech and writing of the time to describe a large tract of territory claimed by England, France, Spain, the United States and Virginia.

3. The act of cession of 1783 is remodelled from the act of 1781, in
*491 which the territory of Virginia is divided into two * parts by such description that, if the words of description are construed technically, the Ohio River itself is not described.

4. The act of 1783 is not strictly an act of cession, but a proposition for compromise between Virginia and the United States of a dispute in which the United States claimed that Virginia had no title to the territory southeast or northwest of the Ohio River.

For these reasons it is evident that the words "within the limits of the Virginia Charter to the northwest of the river Ohio" in the act of Virginia of 1783 are words of governmental description of an indeterminate tract, contained in an agreement of compromise, and not words of definite boundary contained in an instrument of grant.

It is therefore improper to treat the act and deed of cession of Virginia as though they were a carefully drawn deed of grant by metes and bounds, and to give to the words "to the northwest of the river Ohio" the same technical significance which they might have if they constituted a part of a carefully drawn description by metes and bounds of a territory admitted to be the undisputed property of the grantor.

By the insertion of the provision respecting the free navigation of the Ohio River, Virginia accomplished three important things.

1. It bound the State of Kentucky to apply to the Ohio River the principles relating to the navigable waters wholly within the Northwest Territory, regarding

which it was by the ordinance provided that: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor."

2. It compelled Kentucky to agree with the United States that it would never attempt to control the navigation of the Ohio River. If Kentucky had gone over to Spain, the first act, of course, would have been to close the Ohio and Mississippi rivers to navigation. By keeping Kentucky in the Union
*492 * and binding her to exercise only that concurrent jurisdiction which States bounded by navigable rivers would be entitled to exercise by the rules of international law, the possibility of either the Ohio or the Mississippi rivers being closed to navigation would be done away with, since Spain, without Kentucky and the southwest territory, east of the Mississippi, would not have been strong enough to have violated the obligations of the treaty of 1783, which provided for the free navigation of the Mississippi.

3. It bound itself and Kentucky to recognize as having concurrent jurisdiction with itself over the Ohio River "only the States which may possess the opposite shores of said river," that is, the United States and the States to be formed in the Northwest Territory, bounding on the Ohio River. Thus, all complications with the Ohio Company, or any other land company, would be avoided, since the United States, by consenting to the act, would bind themselves to protect Virginia and Kentucky from any such claims of jurisdiction over the Ohio River by any land company.

In this act Virginia treats itself and Kentucky as bounding *on* the Ohio River. The words are: "That the use and navigation of the river Ohio, so far as the territory of the proposed State or the territory which shall remain within the limits of this Commonwealth *lies thereon*," etc.

Further, this act is an admission by Virginia that the State or States possessing the opposite shores of the river, which at that time was the United States, had a right to exercise concurrent jurisdiction over the Ohio River with itself and Kentucky, since it does not purport to grant to the United States any new rights.

Probably nothing was further from the intention of the Virginia legislature in adopting the act of cession of 1783 than to make claim to exclusive territorial rights over the Ohio River, as against the United States. The advantages of the Union were at that time fully recognized, and the immense value of the water-ways to the civilization of that period made it the one idea of the State to keep the great water-ways open to free navigation, the States on both sides
*493 possessing jurisdiction * over the river for the proper preservation of peace and order thereon.

Unless the terms of written instruments make it absolutely clear that it was the intention that the boundary line between the States on the opposite sides of the river should be elsewhere than at the middle line, that line should be the boundary.

As above shown, the words of the act of cession of the Northwest Territory do not necessarily fix the boundary line elsewhere than at the middle line of the Ohio River.

It is therefore submitted that the middle line of the Ohio River is the boundary line between the States of Indiana and Kentucky.

II. If it be granted that the southern boundary of the State of Indiana is the low-water mark of the Ohio River upon the northwest side, then is that low-

water mark of the Ohio River on the northwest side, at the present time, on the north or the south margin of the "Green River Island" tract and the "Buck Island" tract? Does the present location of this low-water mark fix the state boundary line?

The testimony introduced by the State of Indiana proves conclusively that the low-water mark on the northwest side of the Ohio River is, at the present time, south of the "Green River Island Tow-head," and that the whole tract is an accretion to the "Green River Island" tract within the last twenty or thirty years.

III. If it be granted that the low-water mark on the northwest side of the Ohio River is, at the present time, along the southern margin of the "Green River Island" tract, and the "Buck Island" tract; and that the location of this low-water mark at the present time does not fix the state boundary, is it necessary to examine into the facts relating to the location of the low-water mark prior to the year 1816, when the State of Indiana was formed with the Ohio River as its boundary on the south, or does the formation of the State of Indiana, in 1816, with that boundary, so fix the boundary, as against the State of Kentucky, as to make evidence as to the location of the low-water mark prior to that date, immaterial?

*494 * It is submitted on the proof that, even if it is necessary for the State of Indiana in this case to make proof of the location of the low-water mark on the northwest side of the Ohio River prior to the present time, it is not necessary that it should in its proof go further back than the year 1816; since in that year the State of Kentucky recognized the right of the United States and of the State of Indiana to exercise jurisdiction at least to the low-water mark of the Ohio River on the northwest side.

IV. If the location of the state boundary line was definitely fixed in the year 1816 at the low-water mark of the Ohio River, was the low-water mark on the northwest side of the Ohio River, in 1816, on the north or south margin of the "Green River Island" tract and the "Buck Island" tract, and has it ever since remained as located in 1816?

It is shown by the testimony of living witnesses, practically without contradiction, that, since 1820, the depression north of the "Green River Island" tract has remained substantially as it is at present, the height of the bottom of the depression above low-water mark changing slightly from year to year by the washing and filling caused by the high water at seasons of overflow, but the average height above low-water mark remaining substantially the same.

It is submitted, therefore, that, if the low-water mark on the northwest side of the Ohio River is the state boundary, the State of Indiana has shown, by living witnesses, that this line of low-water mark, since 1820, has been on the south margin of both the "Green River Island" tract and the "Buck Island" tract. The testimony referred to under the sixth point of this brief shows that the same state of facts existed between 1820 and 1816.

V. If it be necessary for the purpose of determining the state boundary to examine into the location of the low-water mark on the northwest side of the Ohio River as it existed prior to 1816, did the United States survey of 1806, a meander line of which ran along the north side of the "Green River Island" tract and the "Buck Island" tract, affect the location of the state boundary line?

*495 * Considering the uncertain state of the law, at the time of the United States survey of 1806, with regard to the meaning of the words "to the northwest of the river Ohio;" considering also the fact that there was an outstanding Virginia patent on a part of the "Green River Island" tract (the validity of which will be considered later); considering also that the Henderson County

Court of Kentucky had taken upon itself to allow surveys to be made on the "Green River Island" tract by Kentucky surveyors, thus incidentally determining that the "Green River Island" tract was not "to the northwest of the river Ohio;" considering also that, for the United States surveyor to have surveyed the "Green River Island" tract at that time would have required of him the determination of a great question which is yet undetermined; considering also that the surveyor of the United States, in going on the "Green River Island" tract to make surveys over the Kentucky surveys would have doubtless exposed himself to personal violence and ejection from the land, it is not to be wondered that he accepted the interpretation of the words, "to the northwest of the river Ohio," placed upon them by the Kentucky courts, and made return that, in his individual opinion, the bank of the bayou was the bank of the Ohio, and that his superiors did not question his survey.

It is submitted, therefore, that the above considerations greatly weaken, if they do not totally destroy any evidential force that the United States survey of 1806 may be claimed to have, as bearing upon the question of the location of the low-water mark, in 1806, with relation to the "Green River Island" tract.

As evidence in itself of the boundary between the States, it is absolutely worthless, since meander lines are not intended to show the low-water mark, but only to approximately determine the location of the banks of the stream meandered. *Railroad Co.* v. *Schurmeir,* 7 Wall. 272.

VI. If the state boundary line was not definitely fixed at the low-water mark on the northwest side of the Ohio River, in 1816, but was so fixed by the deed of cession from Virginia to the United States in 1784, and by the act
*496 of cession of Virginia * in 1783, was the low-water mark on the northwest side of the Ohio River, in 1783 and 1784, on the north or the south margin of the "Green River Island" tract and the "Buck Island" tract, and has it ever since remained as it existed in 1783 and 1784?

Counsel discussed the evidence on this point at length, and concluded: Everything, therefore,—science, tradition and evidence of deceased and living persons,—points to the conclusion that the low-water mark on the northwest side of the Ohio River, is, and since 1783, has been along the south margin of the "Green River Island" and the "Buck Island" tracts. And hence the conclusion is irresistible that if the low-water mark on the northwest side of the Ohio River be the state boundary, therefore the state boundary runs to the south of all the disputed tracts, leaving all these tracts within the jurisdiction of the State of Indiana.

VII. If it be granted that the southern boundary of the State of Indiana is the low-water mark on the northwest side of the Ohio River, and that the low-water mark on the northwest side of the Ohio River at the present time is on the southern margin of the "Green River Island" tract and the "Buck Island" tract; but since the year 1816 or the year 1783, the low-water mark has been along the north margin of those tracts; has the process by which the location of the low-water mark has changed been gradual or sudden, and has such change been a change to a new condition or a return to an old condition? If it should be found that the location of the low-water mark has changed, has the state boundary line changed its location in consequence of such a change of location of the low-water mark?

While the principle of accretion is perhaps not strictly applicable to a case of this kind, since there is no claim that the "Green River Island" tract is a piece of land actually formed by process of deposit within the *existing* banks of the Ohio River, yet, taking into consideration that the tract is a formation by the deposit of the Ohio River within its *geological* banks: that the location of the

main river channel of the Ohio River has been within the recent his-
*497 torical and geological * times south of the "Green River Island" tract where it now is; that if the "Green River Island" tract was ever a true island it was such from a temporary detachment from the territory of Indiana, it is right and proper that this court in deciding a question of this kind, which is more properly a question of politics and diplomacy than a question of strict law, should base its decision upon the principles of justice, rather than upon strict and technical rules of law, and should dissolve any doubts which may arise as to the existence or non-existence of claimed facts, which by reason of the unsettled condition of the country cannot be proved with absolute accuracy, by calling to its assistance the principle of accretion, and if it should be of opinion that the low-water mark on the northwest side of the Ohio River is the boundary between the States of Indiana and Kentucky, should adjudge that the boundary of the State of Indiana, to which the disputed tracts are now finally and completely attached, is along the southern margin.

VIII. If this court should find that the state boundary line is along the north margin of the "Green River Island" tract, does it also extend along the north or the south margin of the "Buck Island" tract by reason of the fact that the "Buck Island" tract, is an accretion to or a part of the "Green River Island" tract, or an accretion to or a part of the undisputed soil of Indiana?

It will be noticed that, in the above, two facts are assumed: (1) That the low-water mark on the northwest side of the Ohio River is the state boundary line. (2) That the low-water mark of the Ohio River is on the north margin of the "Green River Island" tract.

Both these facts the State of Indiana expressly denies. If, however, the facts thus assumed to exist were true, the testimony shows that the "Buck Island" tract is an accretion to the undisputed soil of Indiana, and that hence the state boundary line is upon its south margin.

IX. The State of Kentucky has not exercised sovereignty and jurisdiction over the "Green River Island" tract or the "Buck Island" tract in such a manner as to affect the location of the state boundary line.

*498 * The "full possession, jurisdiction and control" which the State of Virginia is alleged to have retained after the cession of 1783, is not shown by the evidence.

The cross-bill of Kentucky places her claim of exercise of jurisdiction over the "Green River Island" tract as distinct from the exercise of jurisdiction by Virginia, over the "Green River Island" tract upon four grounds.

The first ground is, "That the owners of soil thereon, hold their title thereto under grants made by her as the original proprietor thereof."

The State of Kentucky was formed June 1st, 1792. It issued its first patent for land on the "Green River Island" tract in 1818. Twenty-six years elapsed, therefore, before the executive officers of the State of Kentucky determined to issue patents for the land on the "Green River Island" tract. Yet it appears from the statement of Zadok Cramer, the author of "The Navigator," published in 1808, that at the time of publishing that book, there were "six or eight families settled" on the "Green River Island" tract.

All the circumstances surrounding the original issue of the Kentucky patents, are consistent with the theory that doubts existed for twenty-six years on the part of the governors of Kentucky as to their right to issue patents for land on the "Green River Island" tract, and that the doubt was finally solved by an acting governor, who was, perhaps, interested in having the question settled one way or the other. A precedent having been once established, the subsequent governors followed it, as was natural and perhaps proper, since the issuing of the first patent determined the position of Kentucky in the matter, and it was as proper to cover the whole tract with patents as to cover any part of it.

Considering the fact that, for twenty-six years, under a system of land laws which permitted the location of land wheresoever the claimant might see fit, no individual took out a patent from Kentucky upon the "Green River Island" tract though during that period there were from six to ten families settled upon it; considering, also, that the facts surrounding the issue of the first patent
*499 gave rise to the suspicion that the * state officers issuing the patent may have had an interest in it; considering, also, the great looseness with which the patents were finally issued; considering, also, that it was for the pecuniary interest of the settlers on the island to take title from Kentucky rather than from the United States, and that they could not have obtained title from the United States, without having the United States survey of 1806 corrected, it is submitted that the facts surrounding the issue of the Kentucky patents are such as to destroy the force of the issue of those patents as proof of the exercise of jurisdiction by Kentucky over the "Green River Island" tract.

The second claim of Kentucky of right to exercise jurisdiction over the "Green River Island" tract is, "that the property thereon, amounting to many thousands of dollars in value, has always been assessed for taxation by her legally authorized officials, and the taxes thereon paid into her state treasury." This statement is not supported by the evidence.

The third ground on which the State of Kentucky claims to have acquired the right of jurisdiction over the "Green River Island" tract is, "that the residents thereon, possessing the other necessary qualifications, have always voted at her elections as legal voters." It appears that the residents on the "Green River Island" tract voted, when they voted at all, at the town of Henderson, some twenty miles away by the river. Admitting this to be true, it is of little or no effect as showing an exercise of jurisdiction by the State of Kentucky over the disputed tracts.

The fourth ground on which the State of Kentucky claims to have acquired the right of jurisdiction over the "Green River Island" tract is, "that her courts have always exercised undisputed jurisdiction, both civil and criminal, over the said island."

The record in the case of *Garrett* v. *McClain* shows that the jurisdiction of the Kentucky court was disputed in that very case. One of the grounds on which the injunction against the execution of the judgment was asked was, that the Kentucky court which rendered the judgment had no jurisdiction over the "Green River Island" tract, because that tract was "beyond the territorial limits of the State of Kentucky."

*500 * X. The State of Kentucky, in her cross-bill, claims that the State of Indiana has always acquiesced in the claims of Kentucky to the "Green River Island" tract. The State of Indiana did not acquiesce in the original issuing of the Virginia patent, since the State of Indiana did not exist at the time the Virginia patent was issued.

It is impossible for a State of this Union to acquire a right of jurisdiction as against another State, over a disputed territory, by any exercise of jurisdiction, however clear and however long continued, To permit a State to acquire jurisdiction by its own action as against another State, would be to apply the equitable doctrine of laches to dealings between sovereign States. Such a doctrine never has been and never could be admitted to exist by the States of this Union. It would be in violation of the common law maxim,—*nullum tempus occurrit regi.*

While a State may allow rights to be acquired against it by its own citizens if it so chooses, it is inconsistent with the idea of sovereignty that one State or nation should acquire rights of territory and jurisdiction by the inaction of another State. The question of state boundaries is a question to be determined

by the construction of written instruments, and the examination of the facts in connection therewith, and the application of the principles of law and equity so far as they are consistent with state sovereignty. If it should be admitted that there could be any exercise of jurisdiction or acquisition of territory through the action of one State, and the inaction of another, the result of the doctrine would be to produce disputes regarding the territory, which could finally be settled only by force, since States would not permit the courts to determine claims to acquisition of territory.

Such a doctrine would also be subversive of Article I, section 10, of the Constitution of the United States which provides that, "No State shall, without the consent of Congress, enter into any agreement or compact with another State. If the doctrine of laches or limitation is to apply as between States, it could only be sustained upon the theory upon which the doctrine of laches or limitation
*501 is sustained as between * individuals, that is, upon presumption of a prior grant. To hold, therefore, that a State might acquire territory and jurisdiction by its own action, would be practically to hold that one State might enter into compact or agreement with another State, without the consent of Congress, and that the right of jurisdiction which a State of this Union possesses, is a right which may be conveyed by the State without the consent of Congress.

XI. Have the States of Indiana and Kentucky so legislated, and have any acts been done under such legislation which can affect the location of the boundary line between the two States?

The statute of Indiana, of February 27, 1875, referred to in the cross-bill, does not stand by itself. In the year 1873, the State of Kentucky had legislated in regard to the boundary line between the States near the "Green River Island" tract. The statute of Kentucky relating to this matter was approved April 21st, 1873. [This legislation, and the acts of the executive of each State were then reviewed at length, and the results of the examination were claimed to be this:]

The effect of the legislation of Kentucky in 1873, and of Indiana in 1875, since the consent of Congress to it was not obtained, depends, therefore, entirely upon the question whether the meander line of the Ohio River in the United States survey of 1806 was or was not the state boundary line. If it was, it was competent for the two States to provide any evidence of it, as the actual and admitted boundary, which they saw fit.

That the meander line of the United States survey of 1806 was not and could not be the state boundary line is a question which would seem not to admit of argument. When this court held, in the case of *Railroad Company* v. *Schurmeir*, 7 Wall. 272, that the meander lines of the United States surveys were run merely for the purpose of determining the amount of land for which the purchaser from the United States government should pay, it placed a final negative upon any claim that the meander line could ever be a state boundary line. There
*502 is not enough in the fact that a meander * line was run along a river forming the boundary of a State of this Union to raise such a meander line from its humble office of determining whether a person should pay a few dollars, more or less, to the dignity of a boundary line between two States.

The absurdity of the survey of 1875 is apparent when it is considered that if the meander line of the United States survey of 1806 should have been adopted as the boundary of Indiana along the Ohio River, a large and valuable part of the city of Evansville and of the other towns and cities of Indiana on the Ohio River would have become a part of the State of Kentucky. If it was proper for the state boundary line to be fixed at the meander line adjacent to the "Green River Island" tract, it was equally proper that it should be so fixed at all points along the Ohio River.

If these statutes of Indiana and Kentucky made or attempted to make the meander line of the United States survey of 1806 the boundary line, they impaired the obligation of the contract made by the United States with the patentees from the United States adjacent to the "Green River Island" tract, on the north, since these statutes made no provision for compensation to these patentees, for the land taken from them between the bayou and the meander line of the survey of 1806.

It is submitted, therefore,—whether the act of Indiana of 1875 is to be treated as part of a proposed "agreement or compact" between the State of Indiana and the State of Kentucky, or whether it stands by itself as furnishing a proposed rule of evidence in the Indiana courts,—that the acts required to be performed as a prerequisite to the taking effect of the statute were never performed and never can be performed; that the statute itself is unconstitutional and void and that therefore neither this statute nor the acts done thereunder have any effect upon the location of the state boundary line.

Mr. P. W. Hardin, Attorney General of the State, and *Mr. J. Proctor Knott* for the State of Kentucky.

*503 * Mr. Justice Field delivered the opinion of the court.

This is a controversy between the State of Indiana and the State of Kentucky growing out of their respective claims to the possession of and jurisdiction over a tract of land nearly five miles in length and over half a mile in width, embracing about two thousand acres, lying on what is now the north side of the Ohio River.

Kentucky alleges that when she became a State on the 1st of June, 1792, this tract was an island in the Ohio River, and was thus within her boundaries, which had been prescribed by the act of Virginia creating the District of Kentucky. The territory assigned to her was bounded on the north by the territory ceded by Virginia to the United States. The tract in controversy was then and has ever since been called Green River Island. Kentucky founds her claim to its possession and to jurisdiction over it upon the alleged ground that at that time the river Ohio ran north of it, and her boundaries extended to low-water mark on the north side of the river; also upon her long undisturbed possession of the premises, and the recognition of her rights by the legislation of Indiana.

Indiana rests her claim also upon the boundaries assigned to her when she was admitted into the Union on the 11th of December, 1816, of which the southern line was designated "as the river Ohio from the mouth of the Great Miami River to the mouth of the Wabash." This boundary, as she alleges, embraces the island in question, she contending that the river then ran south of it, and that a mere bayou separated it from the mainland on the north.

The territory lying north and west of the Ohio, embracing the State of Indiana, as well as the territory lying south of that river, embracing the State of Kentucky, was, previous to 1776, and down to the cession of the same to the United States, held by the State of Virginia. Indeed, that Commonwealth claimed that all the territory lying north of the Ohio River and west of the Alleghanies and extending to the Mississippi was within her chartered limits. As stated
*504 by Chief Justice Marshall, in *Handly's Lessee* v. *Anthony,* 5 Wheat. * 374, 376, at an early period of the Revolutionary War, "the question whether the immense tracts of unsettled country which lay within the charters of particular States ought to be considered as the property of those States or as an

acquisition made by the arms of all for the benefit of all, convulsed our confederacy and threatened its existence." To remove this cause of disturbance, Congress in September, 1780, passed a resolution recommending "to the several States having claims to waste and unappropriated lands in the western country, a liberal cession to the United States of a portion of their respective claims, for the common benefit of the Union." The Commonwealth of Virginia yielded to this recommendation, and on the 20th of December, 1783, an act was passed by her legislature authorizing her delegates in Congress to convey to the United States all her right, title and claim, as well of soil as of jurisdiction, "to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio," subject to certain conditions, among which was that the territory should be laid out and formed into States containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as the circumstances would admit, and that the States so formed should be distinct republican States, and admitted members of the Federal Union, having the same rights, sovereignty, freedom and independence as the other States. In pursuance of this act the delegates in Congress, on the 1st of March, 1784, executed a formal deed ceding to the United States all the right, title and claim as well of soil as of jurisdiction which the Commonwealth had to the territory or tract of country within the limits of the Virginia charter, *"situate, lying and being to the northwest of the river Ohio,"* for the uses and purposes and subject to the conditions mentioned in the act of the Commonwealth.

By the act of Congress of July 13, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio," a modification was made of the terms of the cession of Virginia, to the effect
*505 that there should be formed in the ceded territory not less than three * nor more than five States, the fixed and established boundaries of which were designated, and of which the Ohio River was declared to be one.

As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry, therefore, is as to what line on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river. Early in the history of the State, doubts were raised on this point, and to quiet them, its legislature, on the 27th of January, 1810, passed the following act declaring the boundaries of certain counties in the Commonwealth:

"Whereas doubts are suggested whether the counties calling for the river Ohio as the boundary line, extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which

"*Be it enacted by the General Assembly,* That each county of this Commonwealth, calling for the river Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the respective counties holding the main land opposite thereto, within this State, and the several county tribunals shall hold jurisdiction accordingly." 1 Statute Law of Kentucky, (1834,) p. 268 Sess. Laws 1810, 100.

Upon this question of boundary we also have, happily, a decision of this

court rendered so early as 1820. In *Handly's Lessee* v. *Anthony,* 5 Wheat. 374, ejectment was brought to recover land which the plaintiff claimed under a grant from the State of Kentucky, while the defendants held under a grant from the United States, and the title depended upon the question whether the land lay in the State of Kentucky or in the State of Indiana. It was separated from the mainland of Indiana by a bayou, a small channel, which made out of the Ohio, and entered that river again a few miles below.

*506 This bayou was from four to five poles wide and its bed was * dry during a portion of the year. The court said that the question whether the land lay within the State of Kentucky or of Indiana depended chiefly upon the land law of Virginia and on the cession of that State to the United States. And in determining this question it went into the consideration of the proper construction to be given to the deed of cession, and reached the conclusion that the boundary between the States was at low-water mark on the northwest side of the river.

"In pursuing this inquiry," said the court, p. 379, "we must recollect, that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying and being to the northwest of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent States. These States, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it Virginia must have had in view the convenience of the future population of the country. When a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only. The river, however, is its boundary. . . . If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling are annual than where they

*507 are diurnal. Wherever the river is a boundary between States, it * is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark. When the State of Virginia made the Ohio boundary of States, she must have intended the great river Ohio, and not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side, would result from attaching to Kentucky, the State on its southeastern border, a body of land lying northwest of the real river, and divided from the mainland only by a narrow channel, through the whole of which the waters of the river do not pass until they rise ten feet above the low-water mark."

This decision has been followed by the courts of Kentucky. See *Church* v. *Chambers,* 3 Dana, 279; *McFarland* v. *McKnight,* 6 B. Mon. 500, 510; *Fleming* v. *Kenny,* 4 J. J. Marsh. 155, 158; *McFall* v. *Commonwealth,* 2 Met. (Ky.) 394. In this last case, the defendant, a justice of the peace for a Cincinnati township, in the State of Ohio, solemnized a marriage on a ferry boat upon the Ohio River, midway between Newport in Kentucky and Cincinnati in Ohio, and was indicted in the courts of Kentucky for unlawfully solemnizing a marriage, and was convicted of the offence, he not having been authorized to perform that ceremony by the county court of that State. The Court of Appeals of Kentucky in affirming the conviction referred to the authority of *Handly's Lessee* v. *Anthony,* and said: "That the boundary and jurisdiction of the State of Kentucky rightfully extend to low-water mark on the western or northwestern side of the river Ohio must now be considered as settled." The same doctrine was maintained in *Commonwealth* v. *Garner,* 3 Gratt. 655, by the General Court of Virginia, at its June term, 1846, after elaborate consideration, against the earnest contention of some of its judges that the jurisdiction of the State after the cession extended to the line of high-water mark on the northwest side of the river.

*508 We agree with the observations of the court in *Handly's Lessee* v. *Anthony,* that great inconvenience would have followed * if land on either side of the river, that was separated from the mainland only by a mere bayou, which did not appear to have ever been navigable, and was dry a portion of the year, had been attached to the jurisdiction of the State on the opposite side of the river; and, in the absence of proof that the waters of the river once flowed between the tract in controversy in this case, and the mainland of Indiana, we should feel compelled to hold that it was properly within the jurisdiction of the latter State. But the question here is not, as if the point were raised to-day for the first time, to what State the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State, separated from the mainland of Indiana by the waters of the Ohio River. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two States. That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress. If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to the low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri* v. *Kentucky,* 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

*509 * The question then becomes one of fact, did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established? There is much evidence introduced on the part of Indiana to show that since her admission into the Union the Ohio River has not passed between the island and the mainland except at intervals of high water; and that at low water the mainland has been accessible for portions at least of the year from the island, free from any water obstructions. Aside from the speculations of geologists, which are not of a very convincing character, the evidence consisted principally of the recollections of witnesses, which were more or less vague and imperfect. Apart from those speculative theories, she produced no evidence that at the time the cession was made by Virginia to the United States in 1784, or when Kentucky became a State, the tract was attached to and formed a part of the territory then ceded, out of which the State of Indiana was created, or that the waters of the Ohio did not run between it and the mainland of Indiana so as to justify its designation as an island in the river. Much evidence has also been given on that subject by Kentucky, and a great number of transactions shown, which proceeded upon the assumption that the tract was within the jurisdiction of that State. It is clear, we think, from the whole testimony, that at an early day after Kentucky became a State, the channel between the island and the mainland of Indiana was often filled with water the whole year and sometimes to the width of two hundred yards; and that water passed through it, of more or less depth, the greater part of the year, until down to a period subsequent to the admission of Indiana into the Union.

But above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim *510 by legal proceedings to * the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.

*511 In the case of *Rhode Island* v. * *Massachusetts,* 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on the same subject, says: "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars.[1] Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." Book II, c. 11, § 149. And Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription,* is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized

*512 nation, a similar possession by an individual excludes the claim * of every other person to the article of property in question." Part II, c. IV, § 164.

Potential as are the considerations drawn from the long silence and acquiescence of Indiana in the claim and pretensions of Kentucky, her affirmative action is not the less persuasive in favor of Kentucky's claim. It appears that on March 26, 1804, Congress authorized a survey into townships, six miles square, of the public lands north of the Ohio River and east of the Mississippi River. 2 Stat. 277, c. 35. Under this act a survey was made of the land in the vicinity of Green River Island in the month of December, 1805, and in April, 1806, and it did not include the island within the territory north of the Ohio, but treated

[1] La tranquillité des peuples, le salut des États, le bonheur du genre humain, ne souffrent point, que les possessions, l'empire, et les autres droits des Nations, demeurent incertains, sujets à contestation, et toujours en état d'exciter des guerres sanglantes. 2 Vattel, ed. Pradier-Fodéré, (1863), 134.

the bank of the bayou or channel north of the island as the bank of that river. The notes of this survey were given in evidence and show conclusively that the officers of the government at that time did not consider the tract in controversy as forming any part of the territory of Indiana, but did consider that the waters of the Ohio River running north of it made the tract now in controversy an island of the river. This survey, from the time it was made, has been regarded as establishing the fact that the southern boundary of Indiana lies north of the island. It is now insisted that the lines of this survey were intended merely as meander lines run for the purpose of defining the sinuosity of the bank and the means of ascertaining the quantity of land then subject to sale, and was not intended as a boundary line of the island. Conceding, for the purposes of this case, that this is true so far as related to the fixing of the precise line of low-water mark, to which the territory of Indiana extended, it does not affect the force of the survey, as evidence that the island was not included within that territory, according to the judgment at that time of the surveying officers of the United States. With knowledge of this survey, the legislature of that State, on the 27th of February, 1875, passed an act entitled, "An act to ascertain the location of the boundary line between the States of Indiana and Kentucky above and near Evansville, and making the same evidence in any dispute." This act recited that difficulty
*513 and * dispute had arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between the two States, and that such difficulty involved the title to large tracts of land above and near the line between Green River Island and the State of Indiana, and empowered and directed the Governor to select a commissioner, who should be a resident of the State and a practical surveyor, to act with a similar commissioner to be appointed by the Governor of Kentucky; and provided that the two commissioners so selected should make a survey of the line dividing the States, beginning at the head of "Green River Island near and opposite to the mouth of Green River, and running thence down the Ohio River to the lower end of the island."

The second and third sections of this act are as follows:

"Sec. 2. In running said line the said commissioners shall consult and be governed by the surveys originally made by the government of the United States when such surveys are not inconsistent with each other, and they shall establish and mark proper monuments along said line, whereby the same may be plainly indicated and perpetuated.

"Sec. 3. Within ten days after making such survey and establishing said line, said commissioners shall reduce the same to writing, giving a full and plain description of all the courses and distances, and of the marks and monuments made and established, and sign and acknowledge the same before some officer authorized to take acknowledgments of deeds which writing, so acknowledged, shall be recorded in the recorder's office in the counties of Vanderburgh and Warrick, and the original filed in the office of the Secretary of State, and such writing, or the record thereof, shall be conclusive evidence in any of the courts of this State of the boundary line between the States of Indiana and Kentucky, between the points on said Green River Island, heretofore indicated."

An appropriation was also made for the survey.

An act of similar purport had been passed by the State of Kentucky on the 23d of April, 1873, authorizing the Governor of that State to appoint a surveyor

to act with the person selected by the Governor of Indiana and make a sur-
*514 vey of the * line. In pursuance of these acts the States each appointed a commissioner to survey the line. The commissioners accordingly, in 1877, made a survey, and ran a line on the north side of Green River Island, and also of the small tract known as Buck Island. In doing this, they followed the lines of the United States survey of 1806. By this survey both these islands were left within the State of Kentucky. Complaint being made of the action of the commissioners in running the line on the high bank, the Governor of Indiana directed the commissioner of that State to suspend any further action under the act, and subsequently visited Evansville, a city in Indiana, northwest of the island, and near the survey made, and examined the line of the survey, and in a subsequent letter to the commissioners stated that the line thus run did not in any part conform to the low-water mark of the river, but that the greater part was upon the bank, and the residue at a distance from it, leaving a tract of land between it and the river.

Subsequently the legislature of Indiana, upon the recommendation of the Governor, repealed the law authorizing the survey, and on the 14th of March, 1877, passed an act authorizing the Governor to enter into negotiations with the Governor of Kentucky for the acquisition from the latter State of all her rights of jurisdiction and soil over the Green River Island and her claim for any ground on the Indiana side of the river at said island, or to establish the line between the States by surveys, to be made in such manner as they might deem just; provided that the Governor of Kentucky should be authorized to enter into the agreement by the legislature of that State, and the consent of Congress should be obtained thereto. These efforts to adjust the boundary line failing, the Governor was authorized to direct the prosecution in this court of a suit for the purpose of determining and settling the boundary.

Now whilst no agreement between the States would be of any validity under the Constitution without the consent of Congress, and the survey made pursuant to the joint action of the two States would not have been legally binding even had it not been withdrawn before the report of the commissioners was
*515 filed in the offices designated in the acts, still the * law of Indiana authorizing the line to be fixed in accordance with the survey of the United States, and no other was made except the one in 1806, although the act speaks of surveys, was a plain recognition on her part that the boundary of the State was north of the island, though it was uncertain where the line should be drawn on the land, inasmuch as the channel of the bayou had been filled up. It is an admission entitled to great weight in explaining the cause of the State's general acquiescence, from the time it was admitted into the Union up to the passage of that act, in the claim and jurisdiction of Kentucky. Independently of the necessity of obtaining the consent of Congress to the execution of any agreement between the two States, it was competent for the State of Indiana to provide for a survey of a line already established, and to make such survey evidence in subsequent controversies upon the subject.

Whilst on the part of Indiana there was a want of affirmative action in the assertion of her present claim, and a general acquiescence in the claim of Kentucky, there was affirmative action on the part of Kentucky in the assertion of her rights, as we have seen by the law declaring the boundaries of her counties on the Ohio River, passed in January, 1810; and there was action taken in the courts of the United States and of the State by parties claiming under her or

her grantor, and there was also action by her officers in the assertion of her authority over the land; all of which tends to support the claim of rightful jurisdiction. It at least shows that her claim was never abandoned by her or her people. On the 10th of February, 1784, Virginia issued a military land warrant to one John Slaughter. In March, 1785, Slaughter had a tract of six hundred acres surveyed, upon which he located a part of that warrant, and the tract was conveyed to him by the Commonwealth of Virginia on the 10th of February, 1790, by patent, in which the land was described by metes and bounds as lying in the district set apart for the officers and soldiers of the Virginia Continental line, on the first large island in the Ohio below the mouth of Green River.

That island was Green River Island. In September, 1821, Slaughter's
*516 * heirs, who were residents of Virginia, brought a suit in ejectment in the Circuit Court of the United States for the District of Kentucky, to recover the land conveyed to their ancestor by this patent, against Garrett and others, who were in possession. The cause was not tried until 1834, when the plaintiffs, who relied entirely upon the validity of the patent to Slaughter, recovered judgment and were awarded restitution of the premises. When the marshal went upon the land to execute the writ for its possession, he was accompanied by one Levi Jones, who claimed to have an equitable title under Slaughter's heirs, and was there to receive possession. Garrett, one of the defendants, concluded to purchase one hundred acres of the land upon which he was living from Jones, and for part of the purchase-money executed to Jones his note. Jones assigned this note to James Rouse, who in turn assigned it to Jackson McLean. McLean brought an action at law upon the note in the Circuit Court of Henderson County, in Kentucky, in which he recovered judgment by default, and sued out a writ of execution, whereupon Garrett filed a bill in equity in the same court, making Jones and Rouse co-defendants with McLean, to enjoin the enforcement of the judgment at law upon the following, among other, grounds: First, that the process in the common law action had been served upon him at his residence on Green River Island, which was not within the territorial limits of the State of Kentucky, but beyond the jurisdiction of the court, and that, therefore, the service of process, judgment and execution were null and void; second, that neither Jones, nor Slaughter, under whom he claimed, had ever had a valid title to the land which Jones had sold him, because the military land warrant upon which Slaughter's patent had been issued could not be located upon land which lay northwest of the Ohio and north of the mouth of the Green River. As evidence that the tract of land in controversy lay in Indiana and not in Kentucky, he filed a copy of the deed of cession from Virginia to the United States as part of his bill. The question of Kentucky's title and right of jurisdiction over Green River Island was thus put in issue and
*517 its decision was necessary to the determination * of the case. Several depositions were taken by each party upon the point, but, upon a full hearing of the case, Garrett's bill was dismissed, with costs and charges. Here were two adjudications, one by the United States Circuit Court and the other by a Circuit Court of the State, that Green River Island was within the jurisdiction of Kentucky. And the record shows that between 1818 and 1877 numerous grants of parcels of land on the island were made by Kentucky, and that between these dates taxes were assessed by her officers upon the lands as being within her territory and jurisdiction.

We have spoken of the character of the testimony introduced on the part of Indiana, and of the fact that it does not touch upon the condition of the channel above the island previous to her admission as a State into the Union. The testimony of the witnesses introduced by the State of Kentucky consisted to a great extent of recollections, which must of necessity have been more or less imperfect. They showed, as already stated, that in former times at some periods of the year there was a large volume of water which passed north of Green River Island, and that sometimes this volume continued throughout the whole year; but they also showed that at a very early period great changes had taken place in the channel north of the island, so that in some portions of the year it was easy to pass on foot from the island to the mainland.

The facts as they existed at the time of the cession of Virginia to the United States in 1784, and even at the time of the admission of Kentucky into the Union, have long since passed beyond the memory of man, and therefore cannot be established by oral testimony. As counsel says, the very grandchildren of men then living are now hoary with age. The facts can only be established as a matter of inference from general facts in regard to the condition of the country, and documentary evidence which in many cases rises little above that of hearsay; such as notices by travellers and maps given by them indicating the position of the tract in question. Of the latter it may be said that they all represent the tract as an island in the river.

*518 * Great changes in the bed of the river were to be expected from the immense volume and flow from its vast water-sheds. These water-sheds, according to the official report of the Tenth Census of the United States, cited by counsel, comprise over two hundred thousand square miles, and more than half of the water from them comes from east of Green River Island, and nearly all the great water-courses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks deepening some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterwards, was but the natural effect of the tremendous forces thus brought into operation.

We have not deemed it important to take up the testimony of each of the numerous witnesses produced in the case by the States of Indiana and Kentucky. It would serve no useful purpose to attempt an analysis of the testimony of each, and to show how little and how much weight should be attributed to it. All the testimony is to be taken with many allowances from imperfect recollection, from the confusion by many witnesses of what they saw with what they heard, or of what they knew of their own knowledge with what they learned from the narrative of others. The clear and admitted facts we have mentioned, corroborated as they are by nearly everything of record presented, leave on our minds a much more satisfactory conclusion than anything derived from the oral testimony before us. The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it.

Our conclusion is, that the waters of the Ohio River, when Kentucky
*519 became a State, flowed in a channel north of the * tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

Judgment in favor of the claim of Kentucky will be entered in conformity with this opinion; and commissioners will be appointed to ascertain and run the boundary line as herein designated, and to report to this court, upon which appointment counsel of the parties will be heard on notice. And it is so ordered.[1]

State of Nebraska v. State of Iowa.

Supreme Court of the United States, 1892.

[143 *United States,* 359.]

When grants of land border on running water, and the banks are changed by the gradual process known as accretion, the riparian owner's boundary line still remains the stream; but when the boundary stream suddenly abandons its old bed and seeks a new course by the process known as avulsion, the boundary remains as it was, in the centre of the old channel: and this rule applies to a State when a river forms one of its boundary lines.

The law of accretion controls on the Missouri River, as elsewhere; but the change in the course of that river in 1877 between Omaha and Council Bluffs does not come within the law of accretion, but within that of avulsion.

THE court stated the case as follows:

This is an original suit brought in this court by the State of Nebraska against the State of Iowa, the object of which is to have the boundary line between the two States determined. Iowa was admitted into the Union in 1846, and its western boundary as defined by the act of admission was the middle of the main
*360 channel of the Missouri River. Nebraska was admitted * in 1867, and its eastern boundary was likewise the middle of the channel of the Missouri River. Between 1851 and 1877, in the vicinity of Omaha, there were marked changes in the course of this channel, so that in the latter year it occupied a very different bed from that through which it flowed in the former year. Out of these changes has come this litigation, the respective States claiming jurisdiction over the same tract of land. To the bill filed by the State of Nebraska the State of Iowa answered, alleging that this disputed ground was part of its territory, and also filed a cross-bill, praying affirmative relief, establishing its jurisdiction thereof, to which cross-bill the State of Nebraska answered. Replications were duly filed and proofs taken.

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[1] For the succeeding phase of this case see *Indiana* v. *Kentucky* (159 U. S. 275), *post,* p. 1155.—Editor

Mr. J. M. Woolworth for the State of Nebraska. *Mr. C. J. Greene* and the *Attorney General* of that State were with him on the brief, in which were cited *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178; 8 Opinions Attorneys General, 177; *Indiana* v. *Kentucky,* 136 U. S. 479.

Mr. Smith McPherson for the State of Iowa. The *Attorney General* of that State and *Mr. J. J. Stewart* were with him on the brief, in which were cited *St. Louis* v. *Rutz,* 138 U. S. 226; *Mulry* v. *Norton,* 100 N. Y. 424.

Mr. Justice Brewer delivered the opinion of the court.

It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans* v. *United States,* 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied
*361 on just principles. Every proprietor * whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (See also *Jones* v. *Soulard,* 24 How. 41; *Banks* v. *Ogden,* 2 Wall. 57; *Saulet* v. *Shepherd,* 4 Wall. 502; *St. Clair County* v. *Lovingston,* 23 Wall. 46; *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178.)

It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." 2 Bl. Com. 262; Angell on Water Courses, § 60; *Trustees of Hopkins' Academy* v. *Dickinson,* 9 Cush. 544; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535; *Hagan* v. *Campbell,* 8 Porter (Ala.) 9; *Murray* v. *Sermon,* 1 Hawks (N. C.) 56.

These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel. In volume 8, Opinions of Attorneys General, 175, 177, this matter received exhaustive consideration. A dispute arose between our government and Mexico, in consequence of changes in the Rio Bravo. The matter having been referred to Attorney General Cushing, he replied at length. We quote largely from that opinion. After stating the case, he proceeds:

"With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the

*362 gradual, and, as it were, insensible * accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary.

"Such is the received rule of the law of nations on this point, as laid down by all the writers of authority. (See ex. gr. Puffend. Jus. Nat. lib. iv, cap. 7, s. ii; Gundling, Jus. Nat. p. 248; Wolff, Jus. Gentium, c. 106–109; Vattel. Droit des Gens, liv. i, chap. 22, s. 268, 270; Stypmanni, Jus. Marit. cap. v. n. 476–552; Rayneval, Droit de la Nature, tom. i, p. 307; Merlin, Répertoire, ss. voc. alluv.)"

Further reference is made in the opinion to the following authorities:

"Don Antonio Riquelme states the doctrine as follows:

" 'When a river changes its course, directing its currents through the territory of one of the two coterminous States, the bed which it leaves dry remains the property of the State (or States) to which the river belonged, that being retained as the limit between the two nations, and the river enters so *363 far * into the exclusive dominion of the nation through whose territory it takes the new course. Nations must, of necessity, submit their rights to these great alterations which nature predisposes and consummates. . . . But, when the change is not total, but progressive only, that is to say, when the river does not abandon either State, but only gradually shifts its course by accretions, then it continues still to be the boundary, and the augmentation of territory, which one country gains at the expense of the other, is to be held by it as a new acquisition of property.' (Derecho Internacional, tom. i, p. 83.)

"Don Andres Bello and Don José Maria de Pando both enunciate the doctrine in exactly the same words, namely:

" 'When a river or lake divides two territories, whether it belong in common to the conterminous riparian States, or they possess it by halves, or one of them occupies it exclusively, the rights, which either has in the lake or river, do not undergo any change by reason of alluvion. The lands insensibly invaded by the water are lost by one of the riparian States, and those which the water abandons on the opposite bank increase the domain of the other State. But if, by any natural accident, the water, which separated the two States, enters of a sudden into the territory of the other, it will thenceforth belong to the State

whose soil it occupies, and the land, including the abandoned river-channel or bed, will incur no change of master.' (Bello, Derecho Internacional, p. 38; Pando, Derecho Internacional, p. 99.)

"Almeda refers to the same point, briefly, but in decisive terms. He says:

"'As the river belongs to the two nations, so, also, the river-bed, if by chance it become dry, is divided between them as proprietors. When the river changes its course, throwing itself on one of two conterminous states, it then comes to belong to the state through whose territory it runs, all community of right in it so far ceasing.' Derecho Publico, tom. i, p. 199.

"Leaving authorities of this class, then, let us come to those which discuss the question in its relation to private rights, and as a doctrine of municipal jurisprudence.

*364 * "The doctrine is transmitted to us from the laws of Rome. (Justinian, Inst. lib. ii, tit. i, s. 20–24; Dig. lib. xii, tit. i, l. 7. See J. Voet ad Pandect tom. i, p. 606, 607. Heince. Recit. lib. ii, tit. 2, s. 358–369; Struvii Syntag. ex. 41, c. 33–25; Bowyers's Civil Law, ch. 14.)

"Don Alfonso transferred it from the civil law to the Partidas. (Partida iii, tit. 28, l. 31.) Thus it came to be, as it still remains, an established element of the laws of Spain and of Mexico. (Alvarez, Instituciones, lib. ii, tit. i, s. 6; Asso, Instituciones, p. 101; Gomez de la Serna, Elementos, lib. ii, tit. 4, sec. 3, no. 2; Escriche, Dic. s. vocc. accession natural, alluvion, avulsion; Febrero Mexicano, tom. 1, p. 161; Sala Mexicano, ed. 1845, tom. ii, p. 62.)

"The same doctrine, starting from the same point of departure, made its way through the channel of Bracton, into the laws of England, and thence to the United States. (Bracton de Legg. Angliae, lib. 2, cap. 2, fol. 9; Blacks. Comm. vol. ii, p. 262; Woolrych on Waters, p. 34; Angell on Water Courses, ch. 2; *Lynch* v. *Allen,* 4 De. & Bat. N. C. R. p. 62; *Murry* v. *Sermon* 1 Hawks, N. C. R. p. 56; *The King* v. *Lord Scarborough,* 3 B. & C. p. 91; S. C. 2 Bligh, N. S. p. 147.

"Such, beyond all possible controversy, is the public law of modern Europe and America, and such, also, is the municipal law both of the Mexican Republic and the United States."

Vattel states the rule thus (Book 1, c. 22, secs. 268, 269, 270):[1]

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[1] § 268. Du droit d'alluvion.

Si le territoire qui aboutit à un fleuve limitrophe n'a point d'autres limites que le fleuve même, il est au nombre des territoires à limites naturelles, ou indéterminés (*territoria arcifinia*), et il jouit du droit; c'est-à-dire que les atterrissements qui peuvent s'y former peu à peu par le cours du fleuve, les accroissements insensibles, font des accroissements de ce territoire, qui en suivent la condition et appartiennent au même maître. Car si je m'empare d'un terrain en déclarant que je veux pour limites le fleuve qui le baigne, ou s'il m'est donné sur ce pied-là, j'occupe par celà même d'avance le droit *d'alluvion,* et, par conséquent, je puis seul m'approprier tout ce que le courant de l'eau ajoutera insensiblement à mon terrain. Je dis *insensiblement,* parce que dans le cas très-rare que l'on nomme *avulsion,* lorsque la violence de l'eau détache une portion considérable d'un fonds et la joint à une autre, en sorte qu'elle est encore reconnaissable, cette pièce de terre demuere naturellement à son premier maître. De particulier à particulier, les lois civiles ont prévu et décidé le cas; ils doivent combiner l'équité avec le bien de l'État et le soin de prévenir les procès.

En cas de doute, tout territoire aboutissant à un fleuve est présumé n'avoir d'autres limites que le fleuve même, parce que rien n'est plus naturel que de le prendre pour bornes, quand on s'établit sur ses bords; et dans le doute, on présume toujours ce qui est plus naturel et plus profitable.

§ 269. Si l'alluvion apporte quelque changement aux droits sur le fleuve.

*365 * "If a territory which terminates on a river has no other boundary than that river, it is one of those territories that have natural or indeterminate bounds (*territoria arcifinia*), and it enjoys the right of alluvion; that is to say, every gradual increase of soil, every addition which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side—or if it is given to me upon that footing, I thus acquired beforehand the right of alluvion; and, consequently, I alone may appropriate to myself whatever additions the current of the river may insensibly make to my *366 * land. I say 'insensibly,' because, in the very uncommon case called avulsion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. The civil laws have thus provided against and decided this case, when it happens between individual and individual; they ought to unite equity with the welfare of the state, and the care of preventing litigations.

"In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself; because nothing is more natural than to take a river for a boundary, when a settlement is made; and wherever there is a doubt, that is always to be presumed which is most natural and most probable.

"As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants on each of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights, with respect to the river are in nowise changed by the alluvion. If, therefore, it happens that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and, notwithstanding the progressive changes in its course, each retains over it the same rights which it possessed before; so that, if, for instance, it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other

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Dès qu'il est établi qu'un fleuve fait la séparation de deux territoires, soit qu'il demeure commun aux deux riverains opposés, soit qu'ils le partagent par moitié, soit enfin qu'il appartienne tout entier à l'un des deux, les divers droits sur le fleuve ne souffrent aucun changement par l'alluvion. S'il arrive donc que, par un effet naturel du courant, l'un des deux territories reçoive de l'accroissement tandis que le fleuve gagne peu à peu sur la rive opposée, le fleuve demeure la borne naturelle des deux territoires, et chacun y conserve se mêmes droits, malgré son déplacement successif; en sorte par exemple, que s'il est partagé par le milieu entre les deux riverains, ce milieu, quoiqu'il ait changé de place, continuera à être la ligne de séparation des deux voisins. L'un perd, il est vrai, tandis que l'autre gagne; mais la nature seule fait ce changement: elle détruit le terrain de l'un, pendant qu'elle en forme un nouveau pour l'autre. La chose ne peut pas être autrement dès qu'on a pris le fleuve seul pour limites.

§ 270. De ce qui arrive quand le fleuve change son cours.

Mais si, au lieu d'un déplacement successif, le fleuve, par un accident purement naturel, se détourne entièrement de son cours, et se jette dans l'un des deux États voisins, le lit qu'il abandonne reste alors pour limites; il demeure au maître du fleuve (§ 267). Le fleuve périt dans toute cette partie, tandis qu'il naît dans son nouveau lit, en qu'il y naît uniquement pour l'État dans lequel il coule.

gains; but nature alone produces this change; she destroys the land of the one, while she forms new land for the other. The case cannot be otherwise determined, since they have taken the river alone for their limits.

"But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into
*367 one of the two neighboring * States, the bed which it has abandoned becomes thenceforward their boundary, and remains the property of the former owner of the river, (sec. 267,) the river itself is, as it were, annihilated in all that part while it is reproduced in its new bed, and there belongs only to the State in which it flows."

The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two States the varying centre of the channel, and that avulsion would establish a fixed boundary, to wit: the centre of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in *Jefferis* v. *Land Company,* 134 U. S. 178, 189. A question between individuals, growing out of changes in the very place now in controversy, was then before this court; and in the opinion, after referring to the general rule, it was observed: "It is contended by the defendant that this well settled rule is not applicable to land which borders on the Missouri River, because of the peculiar character of that stream and of the soil through which it flows, the course of the river being tortuous, the current rapid, and the soil a soft, sandy loam, not protected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away. But it has been held by this court that the general law of accretion is applicable to land on the Mississippi River; and, that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law." It is true that that case came here on demurrer to a bill, and it was alleged in the bill that the land was formed by "imperceptible degrees," and that the process of accretion
*368 "went on so slowly that it could not be observed in its progress; * but, at intervals of not less than three or more months, it could be discerned by the eye that additions greater or less had been made to the shore." The state of facts disclosed by this averment was held not to take the case out of the law concerning accretion, and, after referring to some English authorities, it was said: "The doctrine of the English cases is, that accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that in order to be accretion the formation must be one not discernible by comparison at two distant points of time." And then was quoted from the opinion in *St. Clair* v. *Lovingston,* 23 Wall. 46, these words: "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

The case before us is presented on testimony, and not on allegation. But what are the facts apparent from that testimony? The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. In building the bridge of the Union Pacific Railway Company across the Missouri River, in the vicinity of the tracts in controversy, the builders went down to the solid rock, sixty-five feet below the surface, and there found a pine log a foot and a half in diameter—of course, a deposit made in the long ago. The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing
*369 out of the * underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri River, and disclosed by the testimony; that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the "muddy" Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

*370 * Our conclusions are that, notwithstanding the rapidity of * the changes in the course of the channel, and the washing from the one side and on to

the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.

It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel, the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

We think we have by these observations indicated as clearly as is possible the boundary between the two States, and upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed.

The costs of this suit will be divided between the two States, because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious, interest.[1]

United States v. State of Texas.

Supreme Court of the United States, 1892.

[143 *United States,* 621.]

The Supreme Court of the United States has original jurisdiction of a suit in equity brought by the United States against a State to determine the boundary between that State and a Territory of the United States, and that question is susceptible of judicial determination.

Although it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent, that principle has no application to a suit by one government against another government.

The exercise by this court of original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued.

A suit in equity being appropriate for determining the boundary between two States, the fact that the present suit is in equity, and not at law, is no valid objection to it.

IN EQUITY. The bill was filed by the Attorney General by direction of Congress, contained in section 25 of the act of May 2, 1890, 26 Stat. 81, 92, c. 182, "to provide a temporary government for the Territory of Oklahoma, to

[1]For the final phase of this case see *Nebraska* v. *Iowa* (145 U. S. 519), *post,* p. 1118.—Editor.

enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes." That section was as follows:

"Sec. 25. That inasmuch as there is a controversy between the United
*622 States and the State of Texas as to the ownership * of what is known as Greer County, it is hereby expressly provided that this act shall not be construed to apply to said Greer County until the title to the same has been adjudicated and determined to be in the United States; and in order to provide for a speedy and final judicial determination of the controversy aforesaid, the Attorney General of the United States is hereby authorized and directed to commence in the name and on behalf of the United States, and prosecute to a final determination, a proper suit in equity in the Supreme Court of the United States against the State of Texas, setting forth the title and claim of the United States to the tract of land lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary and a part of its land, and designated on its map as Greer County, in order that the rightful title to said land may be finally determined; and the court, on the trial of the case may, in its discretion, so far as the ends of justice will warrant, consider any evidence heretofore taken and received by the Joint Boundary Commission under the act of Congress approved January thirty-first, eighteen hundred and eighty-five; and said case shall be advanced on the docket of said court, and proceeded with to its conclusion as rapidly as the nature and circumstances of the case permit."

The relief sought by the bill was the "determining and settling the true boundary line between the United States and the State of Texas, and to determine and put at rest questions which now exist as to whether the Prairie Dog Town Fork or the North Fork of Red River, as aforesaid, constitutes the true boundary line of the treaty of 1819."

The State of Texas answered and demurred to the bill assigning four causes of demurrer, only three of which were insisted upon at the argument, viz.:

"1. That it appears by the complainant's own showing by the said bill that she is not entitled to the relief prayed by the bill against this defendant, in that complainant seeks by her said bill to obtain from this court a decree judi-
*623 cially settling * and determining the true boundary line between the United States of America and the State of Texas, which question is political in its nature and character and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States.

"2. That it appears by the terms of complainant's bill that this is a suit by the United States of America against the State of Texas, and it is not competent, under the Constitution and laws of the United States of America for said United States of America to sue one of its component States in her own courts. And especially is it true that said United States is not empowered under her Constitution and laws to sue the State of Texas, in a court of the United States, for the recovery of a right mutually claimed by the United States of America and the State of Texas, to wit, the ownership of certain designated territory, and the establishment of the boundary line between the respective governments."

"4. That this court sitting as a court of equity has no jurisdiction to hear

and determine this controversy between complainant and defendant, because, as appears from complainant's bill and amended bill, complainant's cause of action is legal and not equitable, and that it is a suit or action to recover certain real property claimed by complainant and fully described in the bill of complaint; and if complainant has any right to recover, such right must be asserted, if at all, in a court of law and not in a court of equity as herein attempted. And this defendant further says that so much of the Act of Congress of May 2, 1890, under which this suit is brought, and which authorizes and directs the Attorney General of the United States to commence in this court in the name and on behalf of the United States and to prosecute to a final determination a proper suit in equity setting forth the title and claims of the United States to the tract of land in controversy, is unconstitutional and void in this, that it is not competent under the Constitution of the United States for the Congress of the United States to declare that a suit at law shall be a suit in
*624 equity, and that legal rights shall be tried * and determined in the courts of the United States as if they were equitable rights."

Mr. A. H. Garland for the State of Texas, in support of the demurrer. *Mr. John Hancock, Mr. George Clark, Mr. C. A. Culberson* and *Mr. H. J. May* were with him on the brief.

I. Before considering the demurrers it seems to us proper that the preliminary question should be called to the attention of the court whether the State of Texas is suable in this cause. As a State cannot be sued without its express consent the inquiry is whether the defendant has authorized this suit to be instituted and prosecuted against it. In our opinion it is not a matter of choice of tribunals or expediency of interposing the privilege of exemption from suit, but it involves the jurisdiction of the court, and upon it depends the validity of any decree which may be rendered. *Rhode Island* v. *Massachusetts,* 12 Pet. 657.

At no time has the State of Texas expressed its consent to this suit. Neither the executive nor any other officer has authority to consent that the State should be sued, and it does not appear that such authority has been conferred upon the governor by statute, so that, although an appearance has been entered, the question is still open whether the State is suable.

We do not overlook the settled rule that in cases in which a State shall be a party, in which this court has original jurisdiction, the adoption of the Constitution gave the consent of the States to be sued. *Rhode Island* v. *Massachusetts,* 12 Pet. 657; in this case, however, as we shall hereafter attempt to show, this provision of the Constitution is inapplicable. *United States* v. *Ferreira,* 13 How. 40, and note by Chief Justice Taney on page 52; *Florida* v. *Georgia,* 17 How. 478.

II. The first demurrer suggests not only that the question is in its nature political but that, contrary to the rule governing controversies between two States of the Union, it is such a political question that this court cannot judicially determine it in the exercise of the jurisdiction conferred by the Constitu-
*625 tion. * That a controversy respecting the boundary between two independent nations is a political and not a judicial question is well settled. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature. "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided." *Foster* v. *Neilson,* 2 Pet. 253, 306; *Cherokee Nation* v.

Georgia, 5 Pet. 1; *United States* v. *Arredondo,* 6 Pet. 691, 710; *Garcia* v. *Lee,* 12 Pet. 511.

This rule undoubtedly applied to the treaty of 1819 between the United States and Spain, to that of 1832 between the United States and Mexico and to that of 1838 between the United States and the Republic of Texas, when they were respectively ratified, and no reason is perceived why, after Texas was admitted into the Union, a different principle should control. The several treaties remain intact and are the contracts which define and regulate the relations of the contracting powers. *Wilson* v. *Wall,* 6 Wall. 83, 87.

So, also, the method or tribunal provided by the treaty for the settlement of differences arising thereunder must be resorted to; and as the treaties under consideration stipulate that the boundary shall be determined and marked by commissioners appointed by the respective powers, certainly not a judicial tribunal, it is evident that in its inception the question was political, to be adjusted according to the course of nations, and so remains. *Green* v. *Biddle,* 8 Wheat. 1; *United States* v. *Ferreira,* 13 How. 40.

But if the court shall be of opinion that this controversy, coming over from a time when the two governments were independent, is not a political question to be determined upon principles of law applicable to nations, but is analogous to boundary differences between States of the Union of which the court has original jurisdiction, (*Florida* v. *Georgia,* 17 How. 478; *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *Alabama* v. *Georgia* 23 How. 505, 510; *Virginia* v. *West Virginia,* 11 Wall. 39;) then it is submitted that the judicial power of the
*626 * United States, and especially the orginal jurisdiction of this court, does not extend to controversies between the United States and an individual State.

III. As to the contention embodied in the second ground of demurrer, the Constitution provides that the judicial power shall extend to controversies to which the "United States shall be a party;" to "controversies between two or more States;" "between a State and citizens of another State," and "between a State or the citizens thereof, and foreign States, citizens or subjects." The Supreme Court, by the clause immediately following, is given original jurisdiction only in "cases affecting Ambassadors, other public ministers and consuls, and those in which a State shall be a party." It is to be noticed that wherever a State is mentioned in the clause declaring the extent of the judicial power, the opposite party to the controversy is also mentioned and in no instance does it include the United States. In other words, the parties with whom the separate States can have legal controversies cognizable in the courts of the United States by reason of the parties thereto, are distinctly named and all others are necessarily excluded. Keeping in view the Eleventh Amendment, it has been justly said, so far as the present question is concerned, that the controversies over which the United States courts are given jurisdiction are "those to which the United States might be a party; those to which a State of the Union might be a party, *where the opposite party was another State of the Union.*" 2 Curtis Hist. Const. 444.

The clause establishing the judicial power is arranged by subjects and parties, carefully and accurately grouped, and the cases in which the United States shall be a party are distinctly separated from those in which a State may be. The cases of which this court has original jurisdiction are defined alone by reference to the parties and only two classes of cases are included, namely: those affecting ambassadors, other public ministers and consuls, and those in which a State, in cases over which the judicial power is by the preceding clause extended, shall be a party. In all the other cases mentioned the jurisdiction is declared
*627 to be appellate. * It seems manifest to us, therefore, that the judicial power

does not extend to controversies between the United States and an individual State, nor is the Supreme Court given original jurisdiction in such cases. In this connection, as strengthening this position and illustrating the purpose of the framers of the Constitution, it is worthy of mention that although it was proposed in the Convention to stretch the judicial power to all questions which "involve the national peace and harmony" and "all controversies *between the United States and an individual State* or the United States and the citizens of an individual State," neither of the propositions, in the breadth proposed, were adopted.

A more specific proposition to vest in the judiciary of the United States authority "to examine into and decide upon the claims of the *United States and an individual State to territory*" was peremptorily rejected. Mr. Justice Campbell in *Florida* v. *Georgia,* 17 How. 521.

That this court is without original jurisdiction in cases in which the United States shall be a party was held by Chief Justice Taney in a note to the case of the *United States* v. *Ferreira,* 13 How. 52. Subsequently, it is true, he delivered the opinion of the court in the case of *Florida* v. *Georgia,* 17 How. 478, in which the United States were permitted to adduce evidence in the controversy between Georgia and Florida, but neither the decision nor the opinion indicate a change of views on the subject. The opinion distinctly announces that the "court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor."

The true rule on the subject is thus stated by Mr. Justice Curtis in his dissenting opinion in the above case, and it is not necessarily inconsistent, we think, with the opinion of the majority of the court:

"In distributing this jurisdiction, the Constitution has provided that, in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall
*628 have appellate * jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

"I am not aware that any doubt has ever been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the Constitution. Such is the clear meaning of the words of the Constitution. So it was construed by the Congress, in the judiciary act of 1789, which, by the 11th section, conferred on the Circuit Courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day. . . . We have, then, two rules given by the Constitution. The one, that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the Constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

"It is not to be admitted that there is any real conflict between these clauses of the Constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the Constitution proceeds to distribute that power between the Supreme and inferior courts, it must

be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

"And when it says: 'In all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction,' it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express
*629 terms, when it * speaks of the other cases where appellate jurisdiction is given.

"So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

"It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

"But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The Constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the Constitution pledges the power of the nation to guarantee to every State a republican form of government; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts, forms no exception to the general proposition, that the Constitution confers on the United States powers to govern the people, and not the States.

"There is, therefore, nothing in the general plan of the Constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States."

If this position be sound it necessarily follows that the act of Congress under which the suit is instituted is void. *Marbury* v. *Madison,* 1 Cranch, 137. *In re Metzger,* 5 How. 176.

IV. It is finally insisted, as ground of demurrer, and set out in the amended answer of defendant, "that this court sitting as a court of equity has no jurisdiction to hear and determine this controversy between complainant and defendant."

*630 If it be true that the right asserted under the act of Congress * and set out in the bill is a legal and not an equitable right, there can be no doubt of the want of authority in Congress to direct its prosecution by proceedings in equity, for the distinction between legal and equitable rights and remedies is recognized by the Constitution. *Bennett* v. *Butterworth,* 11 How. 669; *Thompson* v. *Railroad Companies,* 6 Wall. 134; *Scott* v. *Neely,* 140 U. S. 106.

The right claimed by the United States in this case is the legal title to the body of land forming the county of Greer. It asserts this legal title, undertakes to trace it through solemn muniments and seeks to recover possession of the land.

The State of Texas also claims title to the land through the same treaties, and asserts its right of possession not only under said treaties, but under the reservation of ownership contained in the articles of annexation to the United States.

It is believed the cause of action as defined in the act and set out in the bill is legal and not equitable, and consequently the bill should be dismissed. *Lewis* v. *Cocks,* 23 Wall. 466; *Loker* v. *Rolle,* 3 Ves. Jr. 4; *Cavedo* v. *Billings,* 16 Florida, 261.

Mr. Edgar Allan (with whom was *Mr. Attorney General* on the brief) for the United States, opposing.

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought by original bill in this court pursuant to the act of May 2, 1890, providing a temporary government for the Territory of Oklahoma. The 25th section recites the existence of a controversy between the United States and the State of Texas as to the ownership of what is designated on the map of Texas as Greer County, and provides that the act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the Attorney General of the United States was authorized and directed to commence and prosecute on
*631 behalf of the United States a * proper suit in equity in this court against the State of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary. 26 Stat. 81, 92, c. 182, § 25.

The State of Texas appeared and filed a demurrer, and, also, an answer denying the material allegations of the bill. The case is now before the court only upon the demurrer, the principal grounds of which are: That the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States; that it is not competent for the general government to bring suit against a State of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the State, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover real property, is legal and not equitable, and, consequently, so much of the act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void.

The necessity of the present suit as a measure of peace between the General Government and the State of Texas, and the nature and importance of the questions raised by the demurrer, will appear from a statement of the principal facts disclosed by the bill and amended bill.

By a treaty between the United States and Spain, made February 22, 1819, and ratified February 19, 1821, it was provided:

"Art. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude
*632 where it strikes the Rio Roxo of Natchitoches or *Red River;* * then following the course of the Rio Roxo, westward, to the degree of longtitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north;

and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818. But, if the source of the Arkansas River shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. All the islands in the Sabine, and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims and pretensions to the territories described by the said line; that is to say: the United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims and pretensions, to the territories lying west and south of the above-described line; and in like manner, his Catholic Majesty cedes to the said United States, all his rights, claims and pretensions, to any territories east and north of the said line; and for himself, his heirs and successors, renounces all claim to the said territories forever." 8 Stat. 252, 254, 256, Art. 3.

For the purpose of fixing the line with precision, and of placing landmarks to designate the limits of both nations, it was stipulated that each appoint a commissioner and a surveyor, who should meet, before the end of one year from the ratification of the treaty, at Natchitoches, on the Red River, and run and mark the line "from the mouth of the Sabine to the Red River, and
*633 from the Red River to the River Arkansas, * and to ascertain the latitude of the sources of the said river Arkansas, in conformity to what is above agreed upon and stipulated and the line of latitude 42, to the South Sea;" making out plans and keeping journals of their proceedings, and the result to be considered as part of the treaty, having the same force as if it had been inserted therein. Art. 4, 8 Stat. 256.

At the date of the ratification of this treaty, the country now constituting Texas belonged to Mexico, part of the monarchy of Spain. Subsequently, in 1824, Mexico became a separate independent power, whereby the boundary line designated in the treaty of 1819 became the line between the United States and Mexico.

On the 12th of January, 1828, a treaty between the United States and Mexico was concluded, and subsequently, April 5, 1832, was ratified, whereby, as between those governments, the validity of the limits defined by the treaty of 1819 was confirmed. 8 Stat. 372.

By a treaty concluded April 25, 1838, between the United States and the Republic of Texas, which was ratified and proclaimed October 13, 1838, it was declared that the treaty of limits made and concluded in 1828 between the United States and Mexico "is binding upon the Republic of Texas." And in order to prevent future disputes and collisions in regard to the boundary between the two countries, as designated by the treaty of 1828, it was stipulated:

"Art. 1. Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet before the termination of twelve months from the

exchange of the ratifications of this convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red River. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. . . .

"ART. 2. And it is agreed that until this line is marked out as is pro-
*634 vided for in the foregoing article, each of the contracting * parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise without the interference of the other, within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised." 8 Stat. 511.

The treaty of 1838 had not been executed on the 1st day of March, 1845, when Congress, by joint resolution, consented that "the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State" upon certain conditions. 5 Stat. 797. Those conditions having been accepted, Texas by a joint resolution of Congress passed December 29, 1845, was admitted into the Union on an equal footing with the original States in all respects whatever. 9 Stat. 108.

By an act of Congress, approved September 9, 1850, certain propositions were made on behalf of the United States to the State of Texas, to become obligatory upon the parties when accepted by Texas, if such acceptance was given on or before December 1, 1850. One of those propositions was that Texas would agree that its boundary on the north should commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and run from that point due west to the meridian of one hundred and three degrees west from Greenwich, thence due south to the thirty-second degree of north latitude, thence on the parallel of thirty-two degrees of north latitude to the Rio Bravo de Norte, and thence with the channel of said river to the Gulf of Mexico; another, that Texas cede to the United States all her claim to territory exterior to the above limits and boundaries. In consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, the United States agreed to pay to Texas the sum of ten millions
635 * of dollars in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the Treasury of the United States. 9 Stat. 446, c. 49.

By an act of assembly approved November 25, 1850, the above propositions were accepted by Texas, and it agreed to be bound by them according to their true import.

During the whole period of nearly forty years succeeding the treaty of 1819 no action, except as above indicated, was taken to settle the boundary line in question. But, in the year 1859, a joint commission on the part of the United States and Texas commenced the work of running that line, but separated without reaching any conclusion. Nevertheless, in 1860, the commissioner upon

the part of the United States completed the work, without the coöperation of the commissioner of Texas, and reported the result to the General Land Office in 1861. According to the determination of the Commissioner on the part of the United States, and under certain surveys made from 1857 to 1859, pursuant to a contract between two persons named Jones and Brown and the Commissioner of Indian Affairs, the true dividing and boundary line between the United States and the United Mexican States began where the one hundredth meridian touched the main Red River aforesaid, running thence along the line or course of what is now known as the South Fork of the Red River or river of the treaty of 1819.

After the commissioners of the United States and Texas had failed to reach an agreement, the legislature of Texas, by an act approved February 8, 1860, declared, "that all the territory contained in the following limits, to wit: Beginning at the confluence of Red River and Prairie Dog River, thence running up Red River, passing the mouth of South Fork and following main or North Red River to its intersection with the twenty-third degree of west longitude; thence due north across Salt Fork and Prairie Dog River, and thence following that river to the place of beginning; be, and the same is hereby, created into a county to be known by the name and style of the county of Greer."

*636 And by acts of its officers, * proceeding under its statutes, Texas assumed and exercised control and jurisdiction of the territory constituting what is called the county of Greer.

Notwithstanding those assertions of control and jurisdiction, Texas, by an act approved May 2, 1882, made provision for running and marking the line in question. That act provided for the appointment by the governor of a suitable person or persons, who, in conjunction with such person or persons as might be appointed by or on behalf of the United States for the same purpose, should run and mark the boundary line between the Territories of the United States and the State of Texas, in order that "the question may be definitely settled as to the true location of the one hundredth degree of longitude west from London, and whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain, made February 22, 1819."

By an act of Congress, approved January 31, 1885, provision was made for the appointment of a commission by the President to act with the commission to be appointed by the State of Texas in ascertaining and marking the point where the one hundredth meridian of longitude crosses Red River, in accordance with the terms of the treaty of 1819; the person or persons so appointed to make report of his or their action in the premises to the Secretary of the Interior, who should transmit the same to Congress at its next session after the report was made. 23 Stat. 296, c. 47.

Under the last-mentioned acts a joint commission was organized, and it assembled at Galveston, Texas, on February 23, 1886. Being unable to agree as to whether the stream now known as the North Fork of the Red River, or that now called the South Fork or Main Red River, was the river referred to in the treaty of 1819, the joint commission adjourned *sine die* with the understanding that each commission would make its report to the proper authorities and await instructions. The commissioners on the part of the United States reported that "the Prairie Dog Town Fork is the true boundary, and that the

*637 monument should be placed at the intersection * of the one hundredth meridian with this stream;" while the commission on the part of Texas reported that "the North Fork of Red River, as now named and delineated on the maps, is the Rio Roxo or Red River delineated on Melish's maps, described in the treaty of February 22, 1819, and is the boundary line of said treaty to the point where the one hundredth degree of west longitude crosses the same."

The United States claims to have jurisdiction over all the territory acquired by the treaty of 1819, containing 1,511,576.17 acres, between what has been designated as the Prairie Dog Town Fork, or Main Red River, and the North Fork of Red River, being the extreme portion of the Indian Territory lying west of the North Fork of the Red River, and east of the one hundredth meridian of west longitude from Greenwich; and that its right to said territory, so far from having been relinquished, has been continuously asserted from the ratification of the treaty of 1819 to the present time.

The bill alleges that the State of Texas, without right, claims, has taken possession of, and endeavors to extend its laws and jurisdiction over, the disputed territory, in violation of the treaty rights of the United States; that, during the year 1887, it gave public notice of its purpose to survey and place upon the market for sale, and otherwise dispose of, that territory; and that, in consequence of its proceeding to eject *bona fide* settlers from certain portions thereof, President Cleveland, by proclamation issued December 30, 1887, warned all persons, whether claiming to act as officers of the county of Greer, or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands, or from exercising or attempting to exercise any authority over them, and "against purchasing any part of said territory from any person or persons whatever." 25 Stat. 1483.

The relief asked is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called "Greer County," is within the boundary and jurisdiction of the United States or of the State of Texas. The government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

*638 * In support of the contention that the ascertainment of the boundary between a Territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites *Foster* v. *Neilson,* 2 Pet. 253; 307, 309; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 21; *United States* v. *Arredondo,* 6 Pet. 691, 711; and *Garcia* v. *Lee,* 12 Pet. 511, 517.

In *Foster* v. *Neilson,* which was an action to recover certain lands in Louisiana, the controlling question was as to whom the country between the Iberville and the Perdido rightfully belonged at the time the title of the plaintiff in that case was acquired. The United States, the court said, had perseveringly insisted that by the treaty of St. Ildefonso made October 1, 1800, Spain ceded the disputed territory as part of Louisiana to France, and that France by the treaty of Paris of 1803 ceded it to the United States. Spain insisted that the cession to France comprehended only the territory which at that time was denominated Louisiana. After examining various articles of the treaty of St. Ildefonso, Chief Justice Marshall, speaking for the court, said: "In a controversy between two nations concerning national boundary, it is scarcely possible

that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous." Again: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted
*639 with the foreign intercourse * of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and, in its discussion, the courts of every country must respect the pronounced will of the legislature."

In *United States* v. *Arredondo* the court, referring to *Foster* v. *Neilson,* said: "This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty *to lead, but to follow* the action of the other departments of the government." The same principles were recognized in *Cherokee Nation* v. *Georgia* and *Garcia* v. *Lee.*

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the General Government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more States concerning boundary, jurisdiction or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art. 9. At the time of the adoption of the Constitution there existed, as this court said in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended
*640 * by the Constitution, we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court. The cases of *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *New Jersey* v. *New York,* 5 Pet. 284, 290; *Missouri* v. *Iowa,* 7 How. 660; *Florida* v. *Georgia,* 17 How. 478; *Alabama* v. *Georgia,* 23 How. 505; *Virginia*

v. *West Virginia,* 11 Wall. 39, 55; *Missouri* v. *Kentucky,* 11 Wall. 395; *Indiana* v. *Kentucky,* 136 U. S. 479; and *Nebraska* v. *Iowa, ante,* 359, were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In *New Jersey* v. *New York,* 5 Pet. 284, 290, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." And in *Virginia* v. *West Virginia,* it was said by Mr. Justice Miller to be the established doctrine of this court "that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 287, 288; "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. . . . As to 'controversies between two or more States.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress."

*641 * In view of these cases, it cannot, with propriety, be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached—and it seems that one is not probable—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas—that State consenting that its courts may be open for the assertion of claims against it by the United States—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They

must be enforced, if at all, in the state tribunals." Story Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

*642 * The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina,* 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The Constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions,

*643 * and under such regulations as the Congress shall make." Art. 3, § 2.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens* v. *Virginia,* 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—

that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the diginity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words, in the Constitution, "in all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of
*644 right, a party defendant, or in which a State may, of right, be * a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against States. *Hans* v. *Louisiana,* 134 U. S. 1, and authorities there cited; *North Carolina* v. *Temple,* 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to *all* cases," in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United
*645 States and some * of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish

justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State.

Mr. Justice Bradley, speaking for the court in *Hans* v. *Louisiana,* 134 U. S. 1, 15, referred to what had been said by certain statesmen at the time the Constitution was under submission to the people, and said: "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. . . . The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore,* 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States." That case, and others in this court relating to the suability of States, proceeded upon the broad ground that "it is in-
*646 herent in the nature of sovereignty not * to be amenable to the suit of an *individual* without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch* v. *State of Maryland,* 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the

sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.

We are of opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and Texas.

*647 It is contended that, even if this court has jurisdiction, the * dispute as to boundary must be determined in an action at law, and that the act of Congress requiring the institution of this suit in equity is unconstitutional and void as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. This is not a new question in this court. It was suggested in argument, though not decided, in *Fowler* v. *Lindsey,* 3 Dall. 411, 413. Mr. Justice Washington, in that case, said: "I will not say that a State could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The State of New York might, I think, file a bill against the State of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries." But the question arose directly in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 734, which was a suit in equity in this court involving the boundary line between two States. The court said: "No court acts differently in deciding on boundary between States, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time or other kindred causes, it is a case appropriate to equity. As issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, a province or a State is and shall be." When that case was before the court at a subsequent term, Chief Justice Taney, after stating that the case was of peculiar character, involving a question of boundary between two sovereign States, litigated in a court of justice, and that there were no precedents as to forms and modes of proceedings, said: "The subject was however fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill.

Upon that occasion the court determined to frame their proceedings accord-

*648 ing to those which had been * adopted in the English courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And, acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon reëxamining the subject, we are quite satisfied as to the correctness of this decision." 14 Pet. 210, 256. The above cases, *New Jersey* v. *New York, Missouri* v. *Iowa, Florida* v. *Georgia, Alabama* v. *Georgia, Virginia* v. *West Virginia, Missouri* v. *Kentucky, Indiana* v. *Kentucky,* and *Nebraska* v. *Iowa,* were all original suits in equity in this court, involving the boundary of States. In view of these precedents, it is scarcely necessary for the court to examine this question anew. Of course, if a suit in equity is appropriate for determining the boundary between two States, there can be no objection to the present suit as being in equity and

not at law. It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity.

Demurrer overruled.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

MR. JUSTICE LAMAR and myself are unable to concur in the decision just announced.

*649 This court has original jurisdiction of two classes of cases * only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.[1]

State of Nebraska v. State of Iowa.

Supreme Court of the United States, 1892.

[145 *United States,* 519.]

This case was decided February 29, 1892, 143 U. S. 359, and the decree withheld in order to enable the parties to agree to the designation of the boundary between the two States. Such agreement having been reached a decree is now entered accordingly.

THIS case is reported in volume 143 U. S. pages 359 to 370. No decree was entered, the court observing (page 370): "We think we have by these observations, indicated as clearly as is possible the boundary between the two States, and

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[1]For the final phase of this case see *United States* v. *Texas* (162 U. S. 1), *post,* p. 1176.—Editor.

upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed." The parties having come to such an agreement, the court on the 16th of May, 1892, entered the following decree.

Mr. J. N. Woolworth for the State of Nebraska.

Mr. J. Y. Stone, Attorney General of the State, *Mr. J. J. Stewart* and *Mr. Smith McPherson* for the State of Iowa.

Decree.

This cause came on to be heard upon the pleadings and proofs, and was argued by counsel, and thereupon, the parties having agreed upon a designation of the boundary in accordance with the principles set forth in the opinion of this court, filed on February 29, 1892, it is ordered, adjudged and decreed as follows:

That the boundary between the State of Nebraska and the State of Iowa, between the north line of sections twenty-two (22) and twenty-three (23), in township seventy-five (75) north of range forty-four (44) west of the fifth
*520 principal meridian, * according to the surveys of the public lands in the State of Iowa, and the middle, east and west lines of section twenty-eight (28) in said township and range, is, and is hereby established in the middle of the main channel of the Missouri River, save and excepting the part of the said boundary described as follows:

Commencing at a point on the south line of section twenty (20), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian, produced eight hundred and sixty-one and one-half (861½) feet west of the southeast corner of said section, and running thence northwesterly to a point on the south line of lot four (4) of section ten (10), in township fifteen (15) north of range thirteen (13) east of the sixth principal meridian, twenty-two hundred and seventy-five (2275) feet east of the southwest corner of the northwest quarter of the southeast quarter of said section ten (10); thence northerly to a point on the north line of lot four (4) aforesaid, two thousand and sixty-eight (2068) feet east of the centre line of said section ten (10); thence north to a point on the north line of section ten (10), two thousand and sixty-eight (2068) feet east of the quarter section corner on the north line of said section; thence northerly to a point three hundred and twelve (312) feet west of the southeast corner of lot one (1), in section three (3), township fifteen (15) north, range thirteen (13) east aforesaid; thence northerly to a point on the section line between sections two (2) and three (3), three hundred and fifty-eight (358) feet south of the quarter section corner on said line; thence northeasterly to the centre of the southeast quarter of the northwest quarter of section two (2) aforesaid; thence east to the centre of the west half of lot five (5), otherwise described as the southwest quarter of the northwest quarter of section one (1), in township fifteen (15), range thirteen (13) aforesaid; thence southeasterly to a point on the south line of lot five (5) aforesaid, fifteen hundred and forty (1540) feet west of the centre of section one (1), last aforesaid; thence south two thousand

and fifty (2050) feet to a point fifteen hundred and forty (1540) feet west of the north and south open line through said section one (1); thence south-
*521 westerly * to the southwest corner of the northeast quarter of the southwest quarter of section twenty-one (21), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian; thence southeasterly to a point six hundred and sixty (660) feet south of the northeast corner of the northwest quarter of the northeast quarter of section twenty-eight (28), in township seventy-five (75) north, range forty-four (44) west, aforesaid; and said line produced to the centre of the channel of the Missouri River.

Commencing again at the point of beginning first named, namely, a point on the south line of section twenty (20), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian, produced eight hundred and sixty-one and one-half (861½) feet west of the southeast corner of said section, and running thence southeasterly to a point six hundred and sixty (660) feet east of the southwest corner of the northwest quarter of the northwest quarter of section twenty-eight (28), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian, and said line produced to the centre of the channel of the Missouri River.

The territory lying on the west of said line from the point last aforesaid, to the section line between sections two (2) and three (3), in township fifteen (15) north, range thirteen (13) east of the sixth principal meridian, according to the government surveys in Nebraska, and also the territory lying north of the above-described line, to where it intersects the middle, east and west line of section one (1), in said township and range, and the territory lying east of the above-described line from the point last aforesaid to the Missouri, are in the State of Nebraska, and the lands included between and within the above-described line are in the State of Iowa.

It is further ordered that the costs of this suit be paid by the parties equally.

So ordered.

State of Iowa v. State of Illinois.

Supreme Court of the United States, 1893.

[147 *United States*, 1.]

The true line, in a navigable river between States of the Union which separates the jurisdiction of one from the other, is the middle of the main channel of the river.

In such case the jurisdiction of each State extends to the thread of the stream, that is, to the "mid-channel," and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

The boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River.

As the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings cross the Mississippi River, it is ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two States, and that such commission be required to make the proper

examination, and to delineate on maps prepared for that purpose, the true line as determined by this court, and report the same to the court for its further action.

THE case is stated in the opinion.

Mr. John Y. Stone, Attorney General of the State of Iowa, and *Mr. James C. Davis* for complainant.

*2 * *Mr. George Hunt,* Attorney General of the State of Illinois, for respondent.

MR. JUSTICE FIELD delivered the opinion of the court.

The Mississippi River flows between the States of Iowa and Illinois. It is a navigable stream and constitutes the boundary between the two States; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two States for the purposes of taxation and other purposes of government.

The complainant, the State of Iowa, contends that, for taxation, and for all other purposes, the boundary line is the middle of the main body of the river, taking the middle line between its banks or shores without regard to the "steamboat channel," as it is termed, or deepest part of the stream, and that, to determine the banks or shores, the measurements must be taken when the water is in its natural or ordinary stage, neither swollen by floods nor shrunk by droughts.

On the other hand, the defendant, the State of Illinois, claims that, for taxation and all other purposes, its jurisdiction extends to the middle of "the steamboat channel" of the river, wherever that may be, whether on its east or west bank—the channel upon which commerce on the river by steamboats or other vessels is usually conducted and which for that reason is sometimes designated as "the channel of commerce."

The State of Iowa in its bill alleges: That prior to and at the time of the treaty between England, France and Spain, in 1763, 3 Jenkinson's Treaties, 177, the territory now comprising the State of Iowa was under the dominion of France, and the territory now comprising the State of Illinois was under the dominion of Great Britain, and that, by the treaty named, the middle of the river Mississippi was made the boundary line between the British and French possessions in North America.

That by the treaty of Paris between Great Britain and the United States, which was concluded September 3, 1783, 3 Jenkinson's Treaties, 410, Art. II, and 8 Stat. 80, the territory comprising the State of Illinois passed to the United
*3 States; * and that by the purchase of Louisiana from France, under the treaty of April 30, 1803, 8 Stat. 200, the territory comprising the State of Iowa passed to the United States.

That the boundary between the territory comprising the States of Illinois and Iowa remained the middle of the river Mississippi, as fixed by the treaty of 1763.

That by the act of Congress of April 18, 1818, known as the act enabling the people of Illinois to form a State constitution, (3 Stat. 428, c. 67,) the northern

and western boundaries of Illinois were defined as follows: Starting in the middle of Lake Michigan, at north latitude forty-two degrees and thirty minutes, "thence west to the middle of the Mississippi River, and thence down along the middle of that river to its confluence with the Ohio River," and that the constitutions of Illinois of 1818, 1848 and 1870 defined the boundaries in the same way.

And the bill further alleges that the State of Illinois and its several municipalities bordering on the Mississippi River claim the right to assess and do assess and tax, as in Illinois, all bridges and other structures in the river from the Illinois shore to the middle of the steamboat channel, or channel of the river usually traversed by steam and other crafts in carrying the commerce of the river, whether such channel is east or west of the middle of the main body or arm of the river; and that they thus assess and tax, as in that State, the bridge of the Keokuk and Hamilton Bridge Company across the river from Keokuk, Iowa, to Island No. Four, in Hancock County, Illinois, from the west shore of the island westward 2462 feet to the east end of the draw of the bridge, and to a point not over 580 feet east from the Iowa shore of the river and 941 feet west of the middle of the main arm or body of the river at that point.

That the steamboat channel, or channel of the river where boats ordinarily run in carrying the commerce of the river, varies from side to side of the river, sometimes being next to the Illinois shore and then next to the Iowa shore, and, at most points in the river, shifting from place to place as the sands of its bed are changed by the current of the water; that at the point of the Keokuk
*4 and Hamilton bridge mentioned * the river bed is rock and not subject to much change; that at that point, were it not for the bridge, the middle of the steamboat channel would be, and was before the bridge was erected, fully 300 feet east of the east end of the draw in the bridge, or 880 feet from the Iowa shore of the river and 2162 feet from the shore of the river in Illinois on Island No. Four; that at places in the river there are two or more channels equally accessible and useful for navigation by steamboats and other crafts carrying the commerce of the river; and that at the Keokuk and Hamilton bridge the channel used by steamboats is partly artificial, constructed by excavation of rock from the river bed to facilitate the approach to the lock of the United States canal immediately north of the bridge.

That the State of Iowa claims the right to tax all bridges across the river to the middle thereof, and does tax the Keokuk and Hamilton bridge to its middle between the east and west abutments thereof, that is, the west approach and abutment 200 feet and 1096 feet of the bridge proper, thereby treating, for convenience of taxation, the middle of the bridge between abutments as the middle of the river at that point, but which is in fact 225 feet less than one-half the distance across the main arm or body of the river at that point.

That the State of Illinois and its municipalities assess, and tax, as in that State, 716 feet of the bridge actually assessed and taxed in Iowa, and 225 feet of the bridge in addition thereto, located in Iowa but not taxed in that State.

That the Keokuk and Hamilton Bridge Company, owner of the Keokuk and Hamilton bridge, is a corporation of both of said States consolidated, and complains of such double taxation.

That litigation is now pending over such taxation, and is liable at any time to arise over the taxation of any of the other bridges across the river between the said States, now nine in number.

To the end, therefore, that the line between the States may be definitely fixed by the only court having jurisdiction to do so, the complainant prays that this court will take jurisdiction of this bill, and that the State of Illinois be
*5 summoned and * requested to answer it, waiving such answer being on oath, and that upon the final hearing this court will definitely settle the boundary between the States at the said several bridges.

To this bill the State of Illinois appeared by its attorney general and filed its answer, which denied that the boundary line between the States of Iowa and Illinois is the middle of the Mississippi River, and insisted that it is the middle of the steamboat channel, or channel commonly used by boats in carrying the commerce of the river, whether east or west of the middle of the river. It admitted that the State and its municipalities claimed the right to tax and did tax bridges and other structures in the river to the middle of the steamboat channel or channel of commerce, whether such channel was east or west of the middle of the main body or arm of the river, and did assess and tax the Keokuk and Hamilton bridge to its draw and west of the middle of the main body or arm of the river; and that the steamboat channel or channel of commerce is first near one shore and then near the other, and at other places nearly across the river. But it denied the right of the State of Iowa to tax the bridges mentioned crossing the Mississippi River to any point east of the middle of the steamboat channel, or channel of commerce of that river.

To the answer a replication was filed by the State of Iowa.

At the time of filing its answer the State of Illinois filed also its cross-bill, in which it alleges that there exist nine bridges across the Mississippi River between the States, the most southern of which is the Keokuk and Hamilton Railroad bridge and the most northern, the Dunlieth and Dubuque Bridge Company's railroad bridge.

That for the purposes of taxation the State of Illinois and its municipalities claim the right to assess and tax the respective bridges to the middle of the channel of commerce or steamboat channel, that is, the channel usually used by steamboats and other crafts navigating the river; and that on the part of the State of Iowa and its municipalities it is claimed that each State has the right to assess and tax to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel may be.

*6 * That the Supreme Court of Iowa, in the case of *The Dunlieth and Dubuque Bridge Company* v. *The County of Dubuque,* (55 Iowa, 558), held that the authorities in Iowa have the right to tax such structures to the middle of the main arm or body of the stream and no further, though at the point where such structure is situated the channel or part of the river followed by steamboat men in navigating the river is far east of the middle of such main body of the stream.

That following the decision in that case, the authorities in Iowa assess and tax such structures to the middle of the main body of the river.

That at the point of the location of the Keokuk and Hamilton bridge the main body of the river, before the construction of the bridge, was between the Iowa shore at Keokuk, Lee County, Iowa, and the west shore of Island No. Four, located in the city of Hamilton, Hancock County, Illinois, a breadth of about 3042 feet; that in constructing the bridge a solid approach is extended from the shore at Keokuk into the river 200 feet, and from the shore on Island No. Four, in Illinois, about 700 feet, and the main body of the river

confined between the abutments to the bridge 2192 feet apart, and the bridge consists of the east and west abutments, eleven piers, a draw next to the west or Iowa abutment of 380 feet, and ten spans, together 1812 feet.

That the middle of the steamboat channel, or that part of the river usually traversed by steamboat men in navigating the river, is at or near the east end of the draw or pivot span, about 380 feet from the west abutment and 1812 feet from the east abutment.

That the assessor in Illinois in assessing the bridge values the bridge to the east end of the draw and assesses the same against that part of the bridge in Illinois, and the authorities in Iowa value and assess the bridge to the middle thereof, 1096 feet east from the west abutment, as in the State of Iowa; that thereby 716 feet of the bridge are valued and assessed both in Illinois and Iowa; that litigation is now pending in the lower courts between the bridge com-
*7 pany and the authorities over the assessments, and that the same * trouble and complications are liable to arise over the assessment of any other of the bridges.

To the end, therefore, that the boundary line between the States of Illinois and Iowa at said several bridges may be defined and settled, the State of Illinois prays that the State of Iowa be made defendant to this cross-bill, and required to answer it, and that upon the final hearing the court will define and establish at each of the bridges the boundary lines between the States of Illinois and Iowa, to which point the respective States may tax. To this cross-bill the defendant, the State of Iowa, answered, admitting the existence of nine bridges across the Mississippi River, where it forms the boundary between the States of Illinois and Iowa, and that the State of Illinois and its several municipalities bordering upon the river claim the right to tax said bridges from the Illinois shore of the river to the middle of the channel of commerce or steamboat channel, and that the State of Iowa and its municipalities bordering on the river claim the right to tax and do tax the several bridges to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel, that is, that part of the river usually traversed by steam or other vessels carrying the commerce of the river, may be. It therefore prays that upon the final hearing the boundary lines between the two States may be established, to which the respective States may tax.

By setting down the case for hearing on the bill, answer and replication, (without taking any testimony,) and on the cross-bill and the answer to it, all the facts alleged in the answer to the original bill, as well as those alleged in the cross-bill and not denied in the answer, are thereby admitted.

When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line.

The preservation by each of its equal right in the navigation of the
*8 stream is the subject of paramount interest. It * is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream," as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between

Great Britain, France and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi. Thus Wheaton, in his Elements of International Law, (8th ed. § 192,) says:

"Where a navigable river forms the boundary of conterminous States, the middle of the channel, or *Thalweg,* is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river."

And in § 202, whilst thus stating the rule as to the boundary line of the Mississippi River being the middle of the channel, he states that the channel is remarkably winding, "crossing and recrossing perpetually from one side to the other of the general bed of the river."

Mr. Creasy, in his First Platform on International Law, § 231, p. 222, expresses the same doctrine. He says:

"It has been stated that, where a navigable river separates neighboring States, the *Thalweg,* or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquæ,* was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along
*9 some * channel different from the *medium filum.* When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

Mr. Creasy also refers to the language of Dr. Twiss on the same subject, who observes that "Grotius and Vattel speak of *the middle of the river* as the line of demarcation between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary line of the navigable Midchannel. If there be more than one channel of a river, the deepest channel is the Midchannel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression in its bed. . . . The islands on either side of the Midchannel are regarded as appendages to either bank; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the Midchannel of the river will not operate to deprive that nation of its possession, although the water-frontier line will follow the change of the Midchannel."

Halleck in his Treatise on International Law, c. 6, § 23, is to the same effect. He says: "Where the river not only separates the conterminous States, but also their territorial jurisdictions, the *thalweg,* or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object."

Woolsey in his International Law, § 58, repeats the same doctrine and says:

"Where a navigable river forms the boundary between two States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of the parties. If a river changes its bed, the line through the old channel con-
*10 tinues, but the equitable right to the free * use of the stream seems to belong, as before, to the State whose territory the river has forsaken."

The middle of the channel of a navigable river between independent States is taken as the true boundary line from the obvious reason that the right of navigation is presumed to be common to both in the absence of a special convention between the neighboring States, or long use of a different line equivalent to such a convention.

Phillimore, in his Commentaries on International Law, in the chapter upon acquisitions, (c. xii,) speaks of decisions upon the law of property as incident to neighborhood proceeding upon the principle that "midchannel" is the line of demarcation between the neighbors. (Vol. 1, 239.)

The reason and necessity of the rule of international law as to the midchannel being the true boundary line of a navigable river separating independent States may not be as cogent in this country, where neighboring States are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law.

As we have stated, in international law and by the usage of European nations, the terms "middle of the stream" and "midchannel" of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 Stat. 428, c. 67,) under which Illinois adopted a constitution and became a State and was admitted into the Union, made *the middle of the Mississippi River* the western boundary of the State. The enabling act of March 6, 1820, (3 Stat. c. 22, § 2, p. 545,) under which Missouri became a State and was admitted into the Union, made the middle of *the main channel of the Mississippi River* the eastern boundary, so far as its boundary was conterminous with the western boundary of Illinois. The enabling act of August 6, 1846, (9 Stat. 56, c. 89,) under which Wisconsin adopted a constitution and became a State and was admitted into the Union, gives the western boundary of that State, after reaching the river St. Croix, as follows: "Thence down the main channel of said river to the
*11 Mississippi, thence down the centre of the main * channel of that" (Mississippi) "river to the northwest corner of the State of Illinois." The northwest corner of the State of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, "middle of the Mississippi River," and "middle of the main channel of the Mississippi River," and "the centre of the main channel of that river," as thus used, are synonymous. It is not at all likely that the Congress of the United States intended that those terms, as applied to the Mississippi River separating Illinois and Iowa, should have a different meaning when applied to the Mississippi River when separating Illinois from Missouri or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing.

The question involved in this case has been elaborately considered, both by the Supreme Court of Iowa and the Supreme Court of Illinois, in cases relating

to the assessment and taxation of bridges crossing the Mississippi River, as to the point to which the jurisdiction of each State for taxation extends, and they differed in their conclusions. In *Dunlieth and Dubuque Bridge Company* v. *County of Dubuque,* 55 Iowa, 558, 565, the Supreme Court of Iowa, after observing that the act of Congress admitting Iowa into the Union and the constitution of Iowa in its preamble declare that the eastern boundary of the State shall be "the middle of the main channel of Mississippi River," proceeds to inquire what line is understood by those words, "middle of the main channel." The defendant maintained that the deep water of the stream used in the navigation of the river was meant, while the plaintiff insisted that the words described the bed in which the stream of the river flows; that is, the bed over which the water flows from bank to bank. The court thought that the words, when applied to rivers generally, without the purpose of describing their currents or navigable characters, always bore the latter signification, observing that this was their primary meaning, and was of opinion that they were used in that sense in the act of Con-

*12 gress admitting the State into the * Union, and in the constitution of Iowa.

In support of this view the court referred to the changing character of the currents of the river followed by vessels, caused by the shifting nature of the sand bars found in the river. "The course of navigation," it said, "which follows what boatmen call the channel, is extremely sinuous, and often changing, and is unknown except to experienced navigators. On the other hand, the bed of the main river, designated by the word channel, used in its primary sense, is the great body of water flowing down the stream; it is broad and well defined by islands or the main shore. It cannot be possible that Congress and the people of the State, in describing its boundary, used the word channel to describe the sinuous, obscure and changing line of navigation, rather than the broad and distinctly defined bed of the main river. The centre of this river bed channel may be readily determined, while the centre of the navigable channel often could not be known with certainty. The first is a fit boundary line of a State; the second cannot be."

In *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535, 548, the Supreme Court of Illinois reached a different conclusion after an elaborate consideration of the same question. That was a case where an alleged over-estimate was made of a bridge crossing the Mississippi River at St. Louis, and the question discussed was, how far did the jurisdiction of Illinois extend over the river? After observing that when a river is a boundary between States, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at others, the court proceeds, treating the Mississippi River as a common boundary between the States of Illinois and Missouri, to inquire the meaning of the term, "middle of the Mississippi River," used in the enabling act of Congress and in the constitution, defining the boundaries of the State of Illinois. It answers the inquiry by observing that the word "channel" is used as indicating "the space within which ships can and usually do pass," and says: "It is apprehended it

*13 is in this sense the expressions 'middle * of the river,' 'middle of the main channel,' 'midchannel,' 'middle thread of the channel,' are used in enabling acts of Congress and in state constitutions establishing state boundaries. It is the free navigation of the river—when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway'—that States demand shall be secured to them. When a river, navigable in fact, is taken

or agreed upon as the boundary between two nations or States, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either State intended to surrender to the State or nation occupying the opposite shore the whole of the principal channel or highway for vessels and thus debar its own vessels the right of passing to and fro for purposes of defence or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value, to independent States or nations."

The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the States of the Union, which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the "midchannel," and, if there be several channels, to the middle of the principal one, or rather, the one usually followed.

It is therefore ordered, adjudged and declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River. And, as the counsel of the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings—nine in number—cross the Mississippi
*14 River, it is further ordered * that a commission be appointed to ascertain and designate at said places the boundary line between the two States, such commission, consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make the proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action.[1]

State of Indiana v. United States.

Supreme Court of the United States, 1893.

[148 *United States,* 148.]

The State of Indiana is not entitled, under the act of April 19, 1816, c. 57, and the act of March 3, 1857, c. 104, to be paid by the United States the two per cent of the net proceeds of sales by Congress of lands within the State, which the United States agreed by the former act to apply "to the making of a road or roads leading to the said State," and have actually applied to the making of the Cumberland road.

THIS was a petition, filed in the Court of Claims on October 23, 1889, by the State of Indiana against the United States, to recover the sum of $412,184.97, alleged to be due to the State of Indiana out of moneys received by the United States from sales of public lands in that State. The Court of Claims dismissed

[1] For the succeeding phase of this case see *Iowa* v. *Illinois* (151 U. S. 238), *post,* p. 1150.—Editor.

the petition. 26 C. Cl. 583. The petitioner appealed to this court. The facts found by the Court of Claims, and the material provisions of the statutes bearing upon the claim of the petitioner, were as follows:

In the act of April 30, 1802, c. 40, for the admission of the State of Ohio into the Union, one of the propositions offered by Congress, and accepted by the State, was that one twentieth part of the net proceeds of lands within the State, afterwards sold by Congress, should "be applied to the laying out and making public roads, leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State, and through the same, such roads to be laid out under the authority of Congress, with the consent of the several States through which the roads shall pass;" and it was provided that the propositions so
*149 offered were on condition that the State * should provide, by ordinance irrevocable without the consent of Congress, that all lands sold by Congress should be exempt from taxation under authority of the State for five years after sale. 2 Stat. 175. By the act of March 3, 1803, c. 21, § 2, it was enacted that three per cent of these proceeds should be paid, from time to time, to the State, to be applied to the laying out, opening and making roads within it. 2 Stat. 226.

By the act of March 29, 1806, c. 19, for building a road from Cumberland in Maryland to the State of Ohio, (since known as the Cumberland or National road,) and by subsequent acts passed before the admission of the State of Indiana into the Union, Congress appropriated for the building of that road various sums amounting to $710,000, to be reimbursed out of the two per cent fund. 2 Stat. 357, 555, 661, 730, 829; 3 Stat. 206, 282. The expenses upon the road during that period largely exceeded the moneys credited to that fund.

The act of April 19, 1816, c. 57, for the admission of the State of Indiana into the Union, likewise provided that five per cent of the net proceeds of the sale by Congress of lands in the State should be reserved for the making of public roads and canals, of which three fifths should be applied to those objects by the State, and two fifths "to the making of a road or roads leading to the said State, under the direction of Congress." 3 Stat. 290. And by the act of April 11, 1818, c. 49, the Secretary of the Treasury was directed to pay the three per cent, from time to time, to the State of Indiana. 3 Stat. 424.

Similar provisions were contained in the acts for the admission into the Union of Mississippi in 1817, of Illinois in 1818, of Alabama in 1819, and of Missouri in 1820. 3 Stat. 348, 428, 489, 545.

By the act of May 15, 1820, c. 123, Congress directed the road to be continued from Cumberland to Wheeling in the State of Virginia: provided, however, "that nothing in this act contained, or that shall be done in pursuance thereof, shall be deemed or construed to imply any obligation on the part of the
*150 United States to make, or to defray the expenses of * making, the road hereby authorized to be laid out, or of any part thereof." 3 Stat. 604.

In 1822 the road had been finished from Cumberland to Wheeling. In the same year, an act ordering the erecting of toll gates and the imposition of tolls on the road was passed by both houses of Congress, but was vetoed by President Monroe.

A continuance of the road was laid out, graded, bridged and made a highway from the Ohio River opposite Wheeling to the seat of government of the State of Missouri, and upon it was transported the government mail, and it was

opened and used by the public. But this was not accomplished until after toll gates had been erected and tolls imposed upon it by the States of Ohio and Virginia, as authorized by the acts of Congress of March 2, 1831, c. 97, and March 2, 1833, c. 79. 4 Stat. 483, 655. By successive acts, passed from 1829 to 1856 inclusive, and collected in the opinion of the Court of Claims, Congress surrendered the road, as fast as completed, to the States through which it ran.

By the act of September 4, 1841, c. 16, § 16, the two per cent of the net proceeds of the lands sold by the United States in the State of Mississippi, and reserved by former acts for the making of a road or roads leading to that State, was relinquished to the State of Mississippi, to be applied to the making of a railroad from Brandon in that State to the boundary line of Alabama; and by § 17, the like fund was relinquished to the State of Alabama, to be applied to the construction of certain lines of internal improvements in that State. 5 Stat. 457, 458.

By the act of March 2, 1855, c. 139, entitled "An act to settle certain accounts between the United States and the State of Alabama," it was enacted "that the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Alabama, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled under the sixth section of the act of March 2, 1819, for the admission of Alabama into the Union; and that he be required to include in said
*151 account the several reservations under the various * treaties with the Chickasaw, Choctaw and Creek Indians within the limits of Alabama, and allow and pay to the said State five per centum thereon, as in case of other sales." 10 Stat. 630.

The act of March 3, 1857, c. 104, entitled "An act to settle certain accounts between the United States and the State of Mississippi and other States," required the Commissioner of the General Land Office, by § 1, "to state an account between the United States and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles of allowance and settlement as prescribed in the" act of March 2, 1855, c. 139, and to include in like manner the reservations under Indian treaties; and further provided, in § 2, that "the said commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre." 11 Stat. 200.

On December 4, 1872, the Commissioner of the General Land Office stated an account between the United States and the State of Indiana, in which he found that, by accounts referred to, there appeared to be due to the State the following sums:

Balance due December 31, 1856, on account of three per cent fund..	$47 12
Amount of two per cent on net proceeds of sales of public lands from December 1, 1816, to December 31, 1856, (the expenses incident to sales since that date being in excess of the gross receipts)...	413,568 61
Amount of five per cent on the cash value, at $1.25 per acre, of lands within permanent Indian reservations.....	6,333 73
	$419,949 46

*152 * The Commissioner also referred to a table of the acts of Congress making appropriations for the construction of the Cumberland road, which showed that the sums appropriated from 1818 to 1837, under acts requiring them to be reimbursed out of the two per cent reserved for the laying out and making roads in the States of Ohio, Indiana and Illinois, amounted to $2,502,900.45; and that the additional sums appropriated from 1825 to 1836, under acts requiring them to be reimbursed out of the two per cent reserved for laying out and making roads in those three States and Missouri, amounted to $1,555,000. The Commissioner then stated that it would thereby be seen that the proportion of the sums from time to time appropriated for the construction of the Cumberland road, which, by law, were to be replaced in the Treasury out of the five per cent accruing in Ohio, Indiana, Illinois and Missouri, would more than absorb the entire amount of the two per cent which had accrued upon the sales of lands in Indiana; and that, therefore, in the absence of special legislation upon the subject, nothing would appear to be at present payable to the State of Indiana, except the sums of $47.12 on the three per cent account and $6333.73 for Indian reservations.

On January 25, 1873, the Comptroller of the Treasury certified the balance, consisting of those two sums, and amounting to $6380.85, to be due to the State of Indiana. On February 10, 1873, the Secretary of the Treasury, under the authority given him by the act of March 30, 1868, c. 36, (15 Stat. 54,) referred the account to the Comptroller for reëxamination, and he thereupon vacated the former certificate. On February 5, 1874, the Comptroller reaffirmed the former decision and certificate, as to the sum of $6380.85; but reserved for future consideration the question as to the further claim made by the State. This amount of $6380.85 was paid to the State, but was not accepted by it as a final settlement of its demands.

It did not appear, either from that account or from the evidence in the case, what part of the expenditures upon the National road was properly charge-
*153 able to "making a road * to the said State," or what proportion of such expenditures for making a road to the State of Indiana was properly chargeable to the States of Ohio, Illinois and Missouri.

On October 17, 1889, the State of Indiana made a formal demand upon the Commissioner of the General Land Office to state an account between the United States and the State of Indiana, in accordance with the act of March 3, 1857. But no further account than that above mentioned has been stated by the Commissioner of the General Land Office.

Mr. William E. Earle for appellant.

Mr. Assistant Attorney General Parker for appellees.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

By each of the acts of Congress, successively admitting the States of Ohio, Indiana, Illinois and Missouri into the Union, Congress agreed that five per cent of the net proceeds of public lands within the State, sold by Congress, should be applied to the making of a road or roads leading to the State; and by those and other acts it was provided that, of this five per cent fund, three per cent should

be disbursed by the States, and two per cent by the United States. The general purpose was to promote the construction of a national highway connecting the new States in the interior with the old States on the Atlantic seaboard.

In the act for the admission of Indiana, the original obligation assumed by Congress in this respect did not define the termini of the road or roads to be built, or bind Congress to complete any road, or require the two per cent of the proceeds of the sales of lands in Indiana to be expended within the State; but the only obligation was to apply this two per cent fund "to the making of a road or roads leading to the said State, under the direction of Congress." It was for Congress to decide on what part of the road leading to Indiana this fund
*154 should be expended; and Congress had the right to * treat the road as a whole, constructed for the benefit of all the States through which it passed.

It is unnecessary to determine whether this obligation was in the nature of a contract only, or whether it can be considered as in any sense constituting a trust; because, in either aspect, the contract has been performed, or the trust executed, by applying the fund in question to the making of a road "leading to the said State" of Indiana.

It appears by the statement of the account between the United States and the State of Indiana by the Commissioner of the General Land Office, (which there is nothing in the case to control,) that the sums appropriated to the construction of the Cumberland road leading to the State of Indiana greatly exceeded the whole amount of the two per cent fund from sales of lands in the State; and that, therefore, in the absence of special legislation upon the subject, nothing was payable to the State of Indiana on account of this fund.

Congress having a general authority to apply this fund to any part of the road leading to the State of Indiana, the presumption is that this authority was honestly and fairly exercised, and there is nothing whatever in the record which has any tendency to rebut this presumption. Such being the case, the statement in the findings of fact, that it did not appear, from that account or otherwise, what part of the expenditures upon the road was properly chargeable to "making a road to the said State," or what proportion of such expenditures for making a road to the State of Indiana was properly chargeable to the States of Ohio, Illinois and Missouri, is wholly immaterial; and it was so treated by both parties at the argument.

As appears by the definition of the petitioner's position at the beginning of the brief of its counsel, the failure of the United States to build the National road was not made the foundation of the claim, but "was only suggested in argument as a motive, by way of incidental explanation" of the act of March 3, 1857, c. 104, § 2, upon which he relied, and under which he contended that "it was immaterial what moneys had been expended by the government toward the
*155 * construction of the National turnpike." The decision of the case, therefore, turns upon the interpretation and effect of this act.

The argument for the appellant is based upon the following enactments: By the act of September 4, 1841, c. 16, §§ 16, 17, the United States relinquished to the States of Alabama and Mississippi the two per cent fund accruing from sales of lands in those States. By the act of March 2, 1855, c. 139, the Commissioner of the General Land Office was required to state an account between the United States and the State of Alabama, "for the purpose of ascertaining what sum

or sums of money are due to said State, heretofore unsettled," under the act of 1819 admitting that State into the Union, and to include in that account the reservations under treaties with Indians within the limits of Alabama, "and allow and pay to the said State five per centum thereon, as in case of other sales." By the act of March 3, 1857, c, 104, § 1, the commissioner was required to state an account between the United States and the State of Mississippi "upon the same principles of allowance and settlement as prescribed in" the act of 1855; and by section 2 of the act of 1857, "said commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre."

It is argued for the appellant that, as by the act of 1857 the account between the United States and the other States is to be settled "upon the same principles" as prescribed in that act with relation to Mississippi, and in the act of 1855 with relation to Alabama, and as by the act of 1841 the two per cent fund had been relinquished to Alabama and to Mississippi, therefore the payment to the State of the whole two per cent is one of the principles on which the account with each of the other States is to be settled.

But the premises relied on do not support the conclusion. Neither the act of 1857, nor the act of 1855, refers to the act of 1841. The act of 1857 requires
*156 the account with each * State to be settled on "the same principles of allowance and settlement as prescribed" in the act of 1855. The principles of allowance and settlement prescribed in the act of 1855 are that the account with Alabama be stated "for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled," under the act for its admission into the Union, and including five per cent on the Indian reservations within the State "as in case of other sales." The principles of settlement are that the United States shall be charged with the sums due, treating Indian reservations as sales. They may not be limited to Indian reservations, and may well include any unpaid balance of the three per cent fund which Congress had agreed should be disbursed by the States, as well as any part of the two per cent fund which had not been applied by the United States to the making of a road or roads according to their original obligation. But there is nothing, in any of the acts upon the subject, which warrants the inference that Congress intended that, because the United States held themselves to be liable to Alabama and to Mississippi for the two per cent fund which they had never applied as they had agreed, they should therefore be liable to the other States for the like two per cent fund which had been fully appropriated and expended in accordance with their obligations to those States.

These views being conclusive against the right of the State of Indiana to recover anything in this case, it is unnecessary to consider the other questions discussed in the opinion of the Court of Claims and argued in this court.

Judgment affirmed.

State of Virginia v. State of Tennessee

Supreme Court of the United States, 1893.

[148 *United States,* 503.]

The boundary line between the States of Virginia and Tennessee, which was ascertained and adjusted by commissioners appointed by and on behalf of each State, and marked upon the surface of the ground between the summit of White Top Mountain and the top of the Cumberland Mountains, having been established and confirmed by the State of Virginia in January, 1803, and by the State of Tennessee in November, 1803, and having been recognized and acquiesced in by both parties for a long course of years, and having been treated by Congress as the true boundary between the two States, in its districting them for judicial and revenue purposes, and in its action touching the territory in which Federal elections were to be held and for which Federal appointments were to be made, was a line established under an agreement or compact between the two States, to which the consent of Congress was constitutionally given; and, as so established, it takes effect as a definition of the true boundary, even if it be found to vary somewhat from the line established in the original grants.

The history of the Royal Grants, and of the Colonial and State Legislation upon this subject reviewed.

An agreement or compact as to boundaries may be made between two States, and the requisite consent of Congress may be given to it subsequently, or may be implied from subsequent action of Congress itself towards the two States; and when such agreement or compact is thus made, and is thus assented to, it is valid.

What "an agreement or compact" between two States of the Union is, and what "the consent of Congress" to such agreement or compact is, within the meaning of Article I of the Constitution, considered and explained.

A boundary line between States or Provinces which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive.

The case is stated in the opinion.

Mr. R. Taylor Scott, Attorney General of the State of Virginia, *Mr. William F. Rhea,* and *Mr. Rufus A. Ayers,* for the State of Virginia.

Mr. George W. Pickle, Attorney General of the State of Tennessee, (with whom was *Mr. N. M. Taylor, Mr. H. H. Haynes, Mr. Thomas Curtin* and
*504 *Mr. C. J. St. John* on the * brief), *Mr. Abram L. Demoss* and *Mr. A. S. Colyar* for the State of Tennessee.

Mr. Justice Field delivered the opinion of the court.

This is a suit to establish by judicial decree the true boundary line between the States of Virginia and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts.

The State of Virginia, as the complainant, summoning her sister State, Tennessee, to the bar of this court—a jurisdiction to which the latter promptly yields—sets forth in her bill the sources of her title to the territory embraced within her limits, and also of the title to the territory embraced by Tennessee.

The claim of Virginia is that by the charters of the English sovereigns, under which the colonies of Virginia and North Carolina were formed, the boundary line between them was intended and declared to be a line running due west from a point on the Atlantic Ocean on the parallel of latitude thirty-six degrees and thirty minutes north, and that the State of Tennessee, having been created out of the territory formerly constituting a part of North Carolina, the same boundary line continued between her and Virginia. And the contention of Virginia is that the boundary line claimed by Tennessee does not follow this parallel of latitude but varies from it by running too far north, so as to unjustly include a strip of land about one hundred and thirteen miles in length and varying from two to eight miles in width, over which she asserts and unlawfully exercises sovereign jurisdiction.

*505 On the other hand, the claim of Tennessee is that the * boundary line, as declared in the English charters, between the colonies of Virginia and North Carolina was run and established by commissioners appointed by Virginia and Tennessee after they became States of the Union, by Virginia in 1800 and by Tennessee in 1801, and that the line they established was subsequently approved in 1803 by the legislative action of both States, and has been recognized and acted upon as the true and real boundary between them ever since, until the commencement of this suit, a period of over eighty-five years. And the contention of Tennessee is that the line thus established and acted upon is not open to contestation as to its correctness at this day, but is to be held and adjudged to be the real and true boundary line between the States, even though some deviations from the line of the parallel of latitude thirty-six degrees and thirty minutes north may have been made by the commissioners in the measurement and demarcation of the line.

In order to clearly understand and appreciate the force and effect to be accorded to the respective claims and contentions of the parties, a brief history of preceding measures should be given, with reference to the charters and legislation under which they were taken.

On the 23d of May, 1609, James the First of England, by letters patent, reciting previous letters, gave to Robert, Earl of Salisbury, Thomas, Earl of Suffolk, and divers other persons associated with them, a charter which organized them into a corporation by the name of The Treasurer and Company of Adventurers and Planters of the city of London, for the first colony of Virginia, and granted to them all those lands and territories, lying "in that part of America called Virginia, from the point of land called Cape or Point Comfort, along the sea coast to the northward 200 miles, and from the said point of Cape Comfort along the sea coast to the southward 200 miles, and all that space and circuit of land lying from the sea coast of the precinct aforesaid up into the land throughout, from sea to sea, west and northwest"; and, "also all the islands lying within 100 miles along the coast of both seas of the precinct aforesaid."

*506 * On the 24th of March, 1663, Charles the Second of England granted to

Edward, Earl of Clarendon, and others of his subjects, all that territory within his dominion of America "extending from the north end of the island called Lucke Island, which lyeth in the Southern Virginia seas and within six and thirty degrees of the northern latitude, and to the west as far as the South Seas, and so southerly as far as the river Mathias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so west in a direct line as far as the South Seas aforesaid," and gave them full authority to organize and govern the territory granted under the name of the Province of Carolina.

On the 30th of May, 1665, Charles the Second granted to the above proprietors of Carolina a charter, confirming the previous grant, and enlarging the same so as to include the following-described territory: All that province and territory within America, "extending north and eastward as far as the north end of Currituck River or inlet, upon a straight westerly line to Wyonoke Creek, which lies within or about the degrees of thirty-six and thirty minutes northern latitude; and so west in a direct line as far as the South Seas; and south and westward as far as the degrees of twenty-nine inclusive of northern latitude, and so west in a direct line as far as the South Seas."

The northern and southern settlements of Carolina were separated from each other by nearly three hundred miles, and numerous Indians resided upon the intervening territory, and though the whole province belonged to the same proprietors, the legislation of the settlements was by different assemblies, acting at times under different governors. Early in 1700 the northern part of the province was sometimes called the colony of North Carolina, though the province was not divided by the crown into North and South Carolina until 1732. (Story's Commentaries on the Constitution, sec. 137.) Previously to this division the settlements on the borders of Virginia, and of what was called the colony of North Carolina, had largely increased, and disputes and altercations fre-
*507 quently occurred between the settlers, growing out of the * unlocated boundary between the provinces. Virginians were charged with taking up lands, under titles of the crown, south of the proper limits of their province, and Carolinians were charged with taking up lands which belonged to the crown with warrants from the proprietors. The troubles arising from this source were the occasion of much disturbance to the communities, and various attempts were made by parties in authority in the two provinces to remove the cause of them. Previously to January, 1711, commissioners were appointed on the part of Virginia and North Carolina to run the boundary line between them, and proclamations were made forbidding surveys of the grounds until that line within the disputed limits should be marked. But these efforts for the settlement of the difficulties were unavailing.

In January, 1711, commissioners were again appointed, but failed for want of the requisite means to accomplish their intended object.

In 1728 an attempt to settle the difficulties was renewed, but, as on previous occasions, it failed. The commissioners of the colonies met, but they could not agree at what place to fix the latitude thirty-six degrees thirty minutes north, nor upon the place called Wyonoke, and they broke up without doing anything. The governors of North Carolina and Virginia then entered into a convention upon the subject of the boundary between the two provinces, and transmitted it to England for approval. The king and council approved of it, and so did the lords

and proprietors, and returned it to the governors to be executed. The agreement was as follows:

"That from the mouth of Carrituck River, setting the compass on the north shore thereof, a due west line shall be run and fairly marked, and if it happens to cut Chowan River between the mouth of Nottaway River and Wiccacon Creek, then the same direct course shall be continued towards the mountains, and be ever deemed the dividing line between Virginia and Carolina. But if the said west line cuts Chowan River to the southward of Wiccacon Creek, then from that point of intersection the bounds shall be allowed to continue up the middle
*508 of Chowan River to the middle of the * entrance into said Wiccacon Creek, and from thence a due west line shall divide the two governments. That if said west line cuts Blackwater River to the northward of Nottaway River, then from the point of intersection the bounds shall be allowed to be continued down the middle of said Blackwater to the middle of the entrance into said Nottaway River, and from thence a due west line shall divide the two governments.

"That if a due west line shall be found to pass through islands or cut out small slips of land, which might much more conveniently be included in one province or other, by natural water bounds, in such case the persons appointed for running the line shall have the power to settle natural bounds, provided the commissioners on both sides agree thereto, and that all variations from the west line be punctually noted on the premises or plats, which they shall return to be put upon the record of both governments."

Commissioners were appointed by Virginia and North Carolina to carry this agreement into effect. They met at Currituck Inlet in March, 1728. The variation of the compass was then found to be three degrees one minute and two seconds west, nearly, and the latitude thirty-six degrees thirty-one minutes. The dividing line between the provinces struck Blackwater one hundred and seventy-six poles above the mouth of Nottaway. The variation of the compass at the mouth of Nottaway was two degrees thirty minutes. The line was afterward extended to Steep Rock Creek, 320 miles from the coast, by commissioners Joshua Fry and Peter Jefferson, on the part of Virginia, and Daniel Weldon and William Churton, on the part of North Carolina.

In 1778 and 1779 Virginia and North Carolina having become by their separation in 1776 from the British crown independent States, again took up the question of the boundary between them, and appointed commissioners to extend and complete the line from the point at which the previous commissioners, Fry and Jefferson and others, had ended their work on Steep Rock Creek, to Tennessee River. The commissioners undertook the work with which they were charged, but they could not find the line on Steep Rock Creek, owing,
*509 * as they supposed, to the large amount of timber which had decayed since it was marked. The report of their labors was signed only by the Virginia commissioners. Their report was, in substance, that after running the line as far as Carter's Valley, forty five miles west of Steep Rock Creek, the commissioners of Carolina conceived the idea that the line was farther south than it ought to be, and, on trial, it appeared that there was a slight variation of the needle, which the Virginia commissioners thought arose from their proximity to some iron ore; that various expedients to harmonize the action of the commissioners were unavailing, and the Carolina commissioners, agreeing that they were more than two miles too

far south of the proper latitude, measured off that distance directly north, and ran the line eastwardly from that place, superintended by two of the Carolina and one of the Virginia commissioners, while from the same place it was continued westwardly, superintended by the others, for the sake of expediting the business. The Virginia commissioners subsequently became satisfied that the first line run by them was correct and they, therefore, continued it from Carter's Valley, where it had been left, westward to Tennessee River. The North Carolina commissioners carried their line as far as Cumberland Mountains, protesting against the line run by the Virginia commmissioners.

This was in 1779 and 1780. The line adopted by the Virginia commissioners was known as the Walker line and the line adopted by the commissioners of North Carolina was known as the Henderson line. Walker's line was approved by the legislature of Virginia in 1791, but it never received the approval of the legislature of Tennessee. Previously to the appointment of these commissioners, and on the 6th of May, 1776, the State of Virginia, in a general convention, with that generous public spirit which on all occasions since has characterized her conduct in the disposition of her claims to territory under different charters from the English government, had declared that the territories within the charters erecting the colonies of Maryland, Pennsylvania, North Carolina and South Carolina were thereby ceded and forever confirmed to the people of those colo-
*510 nies respectively. On the * 25th of February, 1790, North Carolina ceded to the United States the territory which afterwards became the State of Tennessee, (2 Charters and Constitutions, 1664,) and which was admitted into the Union on the 1st of June, 1796. 1 Stat. 491, c. 47. Subsequently, the States of Virginia and Tennessee both took steps for the final settlement of the controversy as to the boundary between them. On the 10th of January, 1800, the house of delegates of the general assembly of Virginia adopted the following resolution: "Whereas it is represented to the present general assembly that the people living between what are called Walker's and Henderson's lines, so far as the same run between the State of Tennessee and this State, do not consider themselves under either the jurisdiction of that or this State, and, therefore, refuse the payment of any taxes to either of said States, or to the collectors of either for the general government, because the State of North Carolina, on the 25th of February, 1790, ceded the said State of Tennessee, then called the Southwestern Territory, to the government of the United States; and, therefore, the act entitled 'An act concerning the southern boundary of this State,' passed on the 7th of December, 1791, in this legislature, to establish the line commonly called Walker's line, as the boundary between North Carolina and this State, could only bind the State of North Carolina as far as her territorial limits extended on the line of this State, and could not bind the said Southwestern Territory, which had previously been conveyed, as aforesaid; and

"Whereas, Since the said cession, the general government hath erected the said Southwestern Territory into an independent State, by their act, June 1st, 1796, whereby it has become the duty of the said State of Tennessee and of this State to settle all differences between them with respect to the said boundary line:

"*Resolved, therefore,* That the executive be authorized and requested to appoint three commissioners, whose duty it shall be to meet commissioners, to be appointed by the State of Tennessee, to settle and adjust all differences concern-

ing the said boundary line, and to establish the one or the other of the
*511 * said lines as the case may be, or to run *any other line* which may be agreed on, for settling the same; and that the executive be also requested to transmit a copy of this resolution to the executive authority of the State of Tennessee."

On the 13th of January, 1800, this resolution was agreed to by the Senate.

On the 13th day of November, 1801, the general assembly of Tennessee passed an act on the same subject, Laws of Tennessee, 1801, c. 29, the first section of which is these words:

"*Be it enacted by the general assembly of the State of Tennessee,* That the governor for the time being is hereby authorized and required, as soon as may be convenient after the passing of this act, to appoint three commissioners on the part of this State, one of whom shall be a mathematician capable of taking latitude, who, when so appointed, are hereby authorized and empowered, or a majority of them, to act in conjunction with such commissioners as are or may be appointed by the State of Virginia to settle and designate a true line between the aforesaid States."

The 2d section is as follows:

"*And whereas,* It may be difficult for this legislature to ascertain with precision what powers ought of right to be delegated to the said commissioners; therefore,

"*Be it enacted,* That the governor is hereby authorized and required from time to time to issue such power to the commissioners, as he may deem proper, for the purpose of carrying into effect the object intended by this act, consistent with the true interest of the State."

On the 22d day of January, 1803, a report having been made by the commissioners, which is copied into the act, the legislature of Virginia ratified what had been done in the following act:

"Whereas, The commissioners appointed to ascertain and adjust the boundary line between this State and the State of Tennessee, in conformity to the resolution passed by the legislature of this State for that purpose, have proceeded to the execution of that business, and made a report thereof in the words following, to wit:

*512 * " 'The commissioners for ascertaining and adjusting the boundary line between the States of Virginia and Tennessee appointed pursuant to public authority on the part of each, namely: General Joseph Martin, Creed Taylor and Peter Johnson, for the former, and Moses Fisk, General John Sevier and General George Rutledge, for the latter, having met at the place previously appointed for that purpose, and not uniting, from the general result of their astronomical observations, to establish either of the former lines called Walker's and Henderson's, *unanimously agreed,* in order to *end all controversy* respecting the subject, to run a due west line equally distant from both, beginning on the summit of the mountain generally known by the name of White Top Mountain, where the northeastern corner of Tennessee terminates, to the top of Cumberland Mountain, where the southwestern corner of Virginia terminates, which is hereby declared to be the true boundary line between the said States, and has been accordingly run by Brice Martin and Nathan B. Markland, the surveyors duly appointed for that purpose, and marked under the directions of the said commissioners, as will more at large appear by the report of the said surveyors, hereto annexed, and bearing equal date herewith.

"'2 And the said commissioners do further unanimously agree to recommend to their respective States, that individuals having claims or titles to lands on either side of the said line, as now fixed and agreed on, and between the lines aforesaid, shall not in consequence thereof in anywise be prejudiced or affected thereby; and that the legislatures of their respective States should pass mutual laws to render all such claims or titles secure to the owners thereof.

"'3. And the said commissioners do further agree unanimously to recommend to their States respectively that reciprocal laws should be passed confirming the acts of all public officers, whether magistrates, sheriffs, coroners, surveyors or constables, between the said lines, which would have been legal in either of the said States had no difference of opinion existed about the true boundary line.

*513 "'4. This agreement shall be of no effect until ratified by * the legislatures of the States aforesaid. Given under our hands and seals at William Robertson's, near Cumberland Gap, December the eighth, eighteen hundred and two. (Dec. 8th, 1802.)

"'JOS. MARTIN. [L. S.]
"'CREED TAYLOR. [L. S.]
"'PETER JOHNSON. [L. S.]
"'JOHN SEVIER. [L. S.]
"'MOSES FISK. [L. S.]
"'GEORGE RUTLEDGE. [L. S.]'

"5. And whereas, Brice Martin and Nathan B. Markland, the surveyors duly appointed to run and mark the said line, have granted their certificate of the execution of their duties, which certificate is in the words following, to wit: 'The undersigned surveyors, having been fully appointed to run the boundary line between the States of Virginia and Tennessee, as directed by the commissioners for that purpose, have agreeably to their orders, run the same, beginning on the summit of the White Top Mountain at the termination of the northeastern corner of the State of Tennessee, a due west course to the top of the Cumberland Mountains, where the southwestern corner of Virginia terminates, keeping at an equal distance from the lines called Walker's and Henderson's, and have had the new line run as aforesaid marked with five chops in the form of a diamond, as directed by the said commissioners. Given under our hands and seals, this eighth day of December, eighteen hundred and two. (8th December, 1802.)

"'B. MARTIN. [L. S.]
"'NAT. B. MARKLAND. [L. S.]'

"And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this Commonwealth—

"6. *Be it therefore enacted by the General Assembly of the Commonwealth of Virginia,* That said boundary line between this State and the State of Tennessee, as laid down, fixed and ascertained by the said commissioners above

*514 named, in their * said report above cited, shall be and is hereby *fully* and *absolutely,* to all intents and purposes whatsoever, *ratified, established and confirmed* on the part of this Commonwealth, as the *true, certain* and *real boundary line* between the said States.

"7. All claims or titles derived from the government of North Carolina or Tennessee, which said lands by the adjustment and establishment of the line aforesaid, have fallen into this State, shall remain as secure to the owners thereof as if derived from the government of Virginia, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

"8. The acts of all public officers, whether magistrates, sheriffs, coroners, surveyors or constables, heretofore done or performed in that portion of the territory between the lines called Walker's and Henderson's lines, which has fallen into this State by the adjustment of the present line, and which would have been legal if done or performed in the States of North Carolina or Tennessee, are hereby recognized and confirmed.

"9. This act shall commence and be in force from and after the passing of a like law on the part of the State of Tennessee." Laws of Va. 1802-1803, c. 39.

And on the 3d of November, 1803, Tennessee passed the following ratifying act:

"Whereas, the commissioners appointed to settle and designate the true boundary between this State and the State of Virginia, in conformity to the act passed by the legislature of this State for the purpose, on the thirteenth day of November, one thousand eight hundred and one, have proceeded to the execution of said business, and made a report thereof in the words following, to wit":

(Here follows the report named in the Virginia act:)

"And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this State—

"1. *Be it enacted by the General Assembly of the State of Tennessee,*
*515 That the said boundary line between this State * and the State of Virginia as laid down, fixed and ascertained by the said commissioners above named in their said report above recited, shall be and is hereby fully and absolutely to all intents and purposes whatsoever, *ratified, established and confirmed* on the part of this State as the *true, certain and real* boundary line between the said States.

"2. *Be it enacted,* That all claims or titles to lands derived from the government of Virginia, which said lands, by the adjustment and establishment of the line aforesaid have fallen into this State, shall remain as secure to the owners thereof as if derived from the government of North Carolina or Tennessee, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

"3. *Be it enacted,* That the acts of all officers, whether magistrates, sheriffs, coroners, surveyors or constables, heretofore done or performed in that portion of territory between the lines called Walker's and Henderson's lines, which has fallen into this State by the adjustment of the present line, and which would have been legal if done or performed in the State of Virginia, are hereby recognized and confirmed." Laws of Tennessee, 1803, c. 58.

The line thus run was accepted by both States as a satisfactory settlement of a controversy which had, under their governments and that of the colonies which preceded them, lasted for nearly a century. As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed

as the true, certain and real boundary line between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed from by the government of either, but be respected, maintained and enforced by the governments of both. All modes of legislative action which followed it indicated its approval. Each State asserted jurisdiction on its side up to the line designated, and recognized the lawful jurisdiction of the adjoining State up to the line on the opposite side.

*516 Both States levied taxes on the lands on their respective sides and * granted franchises to the people resident thereon. The people on the south side voted at state and municipal elections for representatives and officers of Tennessee, and the people on the north side at such state and municipal elections voted for representatives and officers of Virginia. The courts of the two States exercised jurisdiction, civil and criminal, on their respective sides, and enforced their process up to that line; and the legislation of Congress in the designation of districts for the jurisdiction of courts, and in prescribing limits for collection districts and for purposes of election, made no exception to the boundary as thus established. Act of July 1, 1862, 12 Stat. 432, 433, c. 119.

The line was marked with great care by the commissioners of the States, with five chops on the trees in the form of a diamond, at such intervals between them as they deemed sufficient to identify and trace the line. Not a whisper of fraud or misconduct is made by either side against the commissioners, for the conclusions they reached and the line they established. It is true that in the year 1856, fifty-four years after the line was thus settled, Virginia, reciting that the line as marked by the commissioners in 1802 had, by lapse of time, the improvement of the country, natural waste and destruction and other causes, become indistinct, uncertain and to some extent unknown, so that many inconveniences and difficulties occurred between the citizens of the respective States and in the administration of their governments, passed an act for the appointment of commissioners, to meet commissioners to be appointed by Tennessee, to again run and mark said line,—not to run and mark a new line,—and provided that where there was no growing timber on any part of the line by which it might be plainly marked, if the old marks were gone, the commissioners should cause monuments of stone to be permanently planted on the line, at least one at every five miles or less, where it might seem best to the commissioners to do so, that the line might be readily identified for its entire length. The whole purpose of the act, as is evident on its face was, not to change the old boundary line, but only

*517 to more perfectly identify it. Tennessee responded to that invitation, * and appointed commissioners to act with those from Virginia. The commissioners together re-run and re-marked the line as it was established in 1802, and planted such additional monuments as were deemed necessary, and they reported to their respective legislatures that they had "accurately run, re-marked and measured the old line of 1802, with all its offsets and irregularities as shown in the surveyor's report" therein incorporated and on the accompanying map therewith submitted. The legislature of Tennessee approved of the action of the commissioners, but Virginia withheld her approval and called for a new appointment of commissioners to re-run and re-mark the line, which was refused by Tennessee as unnecessary. No complaint as to the correctness of the line run and established in 1802 was made by Virginia until within a recent period. She now by her bill

asks that the compact entered into between her and the State of Tennessee, as set forth in the act of the general assembly of Virginia of January 22, 1803, and which became operative by similar action of the legislature of Tennessee on the 3d of November following, be declared null and void, as having been entered into between the States without the consent of Congress, and prays that this court will establish the true boundary line between those States due east and west, in latitude 36° and 30′ north, in accordance with what it alleges to be the ancient chartered rights of that Commonwealth and the laws creating the State of Tennessee and admitting it into the Union.

The Constitution provides that "no State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Is the agreement, made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms "agreement"
*518 or "compact" taken by themselves are sufficiently comprehensive to * embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms "compact" or "agreement" in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

*519 * We can only reply by looking at the object of the constitutional provi-

sion, and construing the terms "agreement" and "compact" by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, (§ 1403,) referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language "may be more plausibly interpreted from the terms used, 'treaty, alliance or confederation,' and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges"; and that "the latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other." And he adds: "In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and,
*520 at the same time, a total prohibition to enter into * any compact or agreement might be attended with permanent inconvenience or public mischief."

Compacts or agreements—and we do not perceive any difference in the meaning, except that the word "compact" is generally used with reference to more formal and serious engagements than is usually implied in the term "agreement"—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining State. It is a legislative declaration which the State and individuals, affected by the recognized boundary line, may invoke against the State as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence

of the States affected, and thus encroach or not upon the full and free exercise of Federal authority. If the boundary established is so run as to cut off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary, or rather for its adoption afterwards, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either State; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked.

In that case the agreement for the running of the line, or its actual survey,
*521 * would in no respect displace the relation of either of the States to the general government. There was, therefore, no compact or agreement between the States in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the States. Such ratification was mutually made by each State in consideration of the ratification of the other.

The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part, there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relates to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced.

In the present case, the consent of Congress could not have preceded the execution of the compact, for, until the line was run, it could not be known where it would lie and whether or not it would receive the approval of the States.
*522 The preliminary agreement was not to accept a line run, whatever it * might be, but to receive from the commissioners designated a report as to the line which might be run and established by them. After its consideration each State was free to take such action as it might judge expedient upon their report. The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings. The line established was treated by that body as the true boundary between the States in the assignment of territory north of it as a portion of districts set apart for judicial and revenue purposes in Virginia, and as included in territory in which federal elections were to be held, and for which appointments were to be made by federal authority in that

State, and in the assignment of territory south of it as a portion of districts set apart for judicial and revenue purposes in Tennessee, and as included in territory in which federal elections were to be held, and for which federal appointments were to be made for that State. Such use of the territory on different sides of the boundary designated, in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of Congress to the boundary line; but the exercise of jurisdiction by Congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assent to it by that body as can usually be obtained from its most formal proceedings.

Independently of any effect due to the compact as such, a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in *Penn* v. *Lord Baltimore,* 1 Vesey Sen. 444, 448; *Boyd* v. *Graves,* 4 Wheat. 513; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, *734; *United States* v. *Stone,* 2 Wall. 525, 537; *Kellogg* v. *Smith,* 7 Cush. 375, 382; *Chenery* v. *Waltham,* 8 Cush. 327; Hunt on Boundaries, (3d ed.) 306.

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As said by this court in the recent case of the *State of Indiana* v. *Kentucky,* (136 U. S. 479, 510,) "it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." In the case of *Rhode Island* v. *Massachusetts,* 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on this subject, says: "The tranquillity of the people, the safety of the States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."[1] (Book II, c. 11, § 149.) And

[1] La tranquillité des peuples, le salut des États, le bonheur du genre humain, ne souffrent point que les possessions, l'empire, et les autres droits des Nations, demeurent incertains sujet à contestation, et toujours en état d'exciter des guerres sanglantes. Il faut donc admettre entre les peuples la prescription fondée sur un long espace de temps, comme un moyen solide et incontestable.

*524 * Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." (Part II, c. 4, § 164.)

There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life.

Notwithstanding the legislative declaration of Virginia in 1803 that the line marked by the joint commissioners of the two States was ratified as the true and real boundary between them, and the repeated reaffirmation of the same declaration in her laws since that date, notably in the Code of 1858, in the Code of 1860 and in the Code of 1887; notwithstanding that the State has in various modes attested to the correctness of the boundary—by solemn affirmation in terms, by legislation, in the administration of its government, in the levy of taxes and the election of officers, and in its acquiescence for over eighty-five years, embracing nearly the lives of three generations, she now, by her bill, seeks to throw aside the obligation from her legislative declaration, because, as alleged, not made upon the express consent, in terms, of Congress, although such consent has been indicated by long acquiescence in the assumption of the validity of the proceedings resulting in the establishment of the boundary, and to have a new boundary line between Virginia and Tennessee established running
*525 due east and west on latitude thirty-six degrees thirty minutes north. *But to this position there is, in addition to what has already been said, a conclusive answer in the language of this court in *Poole* v. *Fleeger,* 11 Pet. 185, 209. In that case Mr. Justice Story, after observing that "it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated to all intents and purposes, as the true and real boundary," adds: "This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress." The Constitution in imposing this limitation plainly admits that with such consent a compact as to boundaries may be made between two States; and it follows that when thus made it has full validity, and all the terms and conditions of it are equally obligatory upon the citizens of both States.

The compact in this case having received the consent of Congress, though not in express terms, yet impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. Nor is it any objection that there may have been errors in the demarcation of the line which the States thus by their compact sanctioned. After such compacts have been adhered to for years neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line established; and this is a complete and perfect answer to the complainant's position in this case.

It may also be stated that if the work of the joint commissioners, under the laws of 1800 and 1801, approved by the legislative action of both States in 1803, could be left out of consideration and a new line run, it would not follow
*526 that the * parallel of latitude thirty-six degrees thirty minutes north would be strictly followed. The charter of Charles the Second designates the northern boundary line of the province of North Carolina as extending from Currituck River or inlet upon a straight westerly line to Wyonoke Creek, which lies *within or about thirty-six degrees thirty minutes north latitude,* from which it is evident that that parallel was only to be the general direction of the line, not one to be strictly and always followed without any variations from it. The purpose of the declaration in the charter of Charles the Second was only that the northern boundary line was to be run in the neighborhood of that parallel. The condition of the country at the time the charter was granted—1665—would have made the running of a boundary line strictly on that parallel a matter of great difficulty, if not impossible. Nor did the needs of grantor or chartered proprietors call for any such strict adherence to the parallel of latitude designated. That neither party expected it, is evident from the agreement made between the governors of Virginia and North Carolina as to running the boundary line between them, and sent to England for approval by the king and council. That agreement provided that, if the west line run should be found to pass through islands or to cut out small slips of land, which might much more conveniently be included in one province than the other by natural water bounds, in such case the persons appointed to run the line should have power to settle natural water bounds, provided, the commissioners on both sides agreed, and that all variations from the west line should be noted on the premises or on plats which they should return, to be put on record by both governors. A possible, indeed, a probable, variation from the line of the parallel of latitude, or the straight line designated, was contemplated by both Virginia and Tennessee. With full knowledge of the line actually designated, and of the ancient charter to Carolina, and of the description in the Constitution of Tennessee, in appointing the joint commissioners, they provided that they should settle and adjust all differences concerning the boundary line, and establish either the Walker or Henderson line, or run
*527 *any other line which might be agreed on * for settling the same;* and that means any line run and measured with or without deviations from time to time from a straight line, or the line of latitude mentioned, as might in their judgment be most convenient as the proper boundary for both States. It was made with numerous variations from a straight line, and from the line of the designated parallel of latitude for the convenience of the two States, and, with the full

knowledge of both, was ratified, established and confirmed as the true, certain and real boundary line between them. And then, fifty-six years afterwards, in consequence of the line thus marked becoming indistinct, it was re-run and re-marked, by new commissioners under the directions of the statutes of 1800 and 1801, in strict conformity with the old line. The compact of the two States, establishing the line adopted by their commissioners, and to which Congress impliedly assented after its execution, is binding upon both States and their citizens. Neither can be heard at this date to say that it was entered into upon any misapprehension of facts. No treaty, as said by this court, has been held void on the ground of misapprehension of facts, by either or both of the parties. *Rhode Island* v. *Massachusetts,* 4 How. 591, 635.

The general testimony, with hardly a dissent, is that the old line of 1802 can be readily traced throughout its whole length; and, moreover, that line has been recognized by all the residents near it, except those in the triangle at Denton's Valley and in another district of small dimensions, in which it is stated that the people have voted as citizens of Virginia and have recognized themselves as citizens of that State. That fact, however, cannot affect the potency and conclusiveness of the compact between the States by which the line was established in 1803. The small number of citizens whose expectations will be disappointed by being included in Tennessee are secured in all their rights of property by provisions of the compact passed especially for the protection of their claims.

Some observations were made, on the argument of the case, upon the propriety and necessity, if the line established in 1803 be sustained, of having it re-run and re-marked, so as hereafter to be more readily identified and traced. But
*528 a careful examination * of the testimony of the numerous witnesses in the case, most of them residing in the neighborhood of the boundary line, as to the marks and identification of the line originally established in 1802, and re-run and re-marked in 1859, satisfies us that no new marking of the line is required for its ready identification. The commissioners appointed under the act of Virginia of 1856, and under the act of Tennessee of 1858, found all the old marks upon the trees in the forest through which the line established ran, in the form of a diamond; and whenever they were indistinct, or, in the judgment of the commissioners, too far removed from each other, new marks were made upon the trees, or if no trees were found at particular places to be marked, monuments in stone were planted. Besides this, the State of Virginia does not ask that the line agreed upon in 1803 shall be re-run or re-marked, but prays that a new boundary line be run on the line of 36° 30′. Tennessee does not ask that the line of 1803 be re-run or re-marked. Nevertheless, under the prayer of Virginia for general relief, there can be no objection to the restoration of any marks which may be found to have been obliterated or become indistinct upon the line as herein defined.

Our judgment, therefore, is that the boundary line established by the States of Virginia and Tennessee by the compact of 1803 is the true boundary between them, and that on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the line.

A decree will, therefore, be entered declaring and adjudging that the boundary line established between the States of Virginia and Tennessee by the compact of 1803 is the real, certain and true boundary between the said States, and that the prayer of the complainant to have the said compact set aside and annulled, and to have a new boundary line run between them on the parallel of 36° 30′ north latitude should be and is denied at the cost of the complainant; and it is so ordered.[1]

State of Iowa v. State of Illinois.

Supreme Court of the United States, 1894.

[151 *United States*, 238.]

At October term, 1892, an order was made appointing commissioners "to locate and mark the state line between the States of Iowa and Illinois, pursuant to the opinion of this court in this cause," reported in 147 U. S. 1. At the same term the commissioners filed a report of their doings, which was ordered to be confirmed, and it was further ordered "that said commissioners proceed to determine and mark the boundary line between
*239 said States throughout its extent, and report thereon to * this court, with all convenient speed." At the present term the State of Illinois moved to set aside the order of confirmation. The State of Iowa resisted on the ground, among others, that the decree of confirmation was a final decree, which could not be set aside at a term subsequent to that at which it was entered. *Held*, that the confirmation of the report was not a final decree deciding and disposing of the whole merits of the cause, and discharging the parties from further attendance; that the court could not dispose of the case by piecemeal; and that until the boundary line throughout its extent is determined, all orders in the case will be interlocutory.

In the exercise of original jurisdiction in the determination of the boundary line between sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded.

THIS was a motion to set aside a decree entered in this cause at October term, 1892.

The case is stated in the opinion.

Mr. M. T. Moloney, Attorney General of the State of Illinois, *Mr. A. W. Green*, and *Mr. Henry S. Robbins* for the motion.

Mr. John Y. Stone, Attorney General of the State of Iowa, *Mr. John F. Lacey*, *Mr. Felix T. Hughes*, and *Mr. James C. Davis* opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was an original suit in equity instituted in this court to determine the boundary line between the States of Iowa and Illinois, and considered upon submission on the pleadings and the briefs of counsel.

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[1] For the succeeding phase of this case see *Virginia* v. *Tennessee* (158 U. S. 267), *post*, p. 1152.—Editor.

On the third of January, 1893, the question at issue was decided, *Iowa* v. *Illinois,* 147 U. S. 1, and an interlocutory decree entered, whereby it was "ordered, adjudged, and declared by this court that the boundary line betwen the State of Iowa and the State of Illinois is the middle of the main navigable chan-
*240 nel of the Mississippi River at the places where * the nine bridges mentioned in the pleadings cross said river; and it is further ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two States, said commission consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make a proper examination, and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action."

March 6, 1893, a joint request was filed in this court, dated January 19, 1893, signed by the attorneys general of the two States concerned, requesting the appointment of certain persons therein suggested as commissioners to fix the boundary line, and that the line be located at once at the Keokuk and Hamilton bridge, and on the next day an order was entered in accordance with this request, as follows: "It is ordered that said Montgomery Meigs, John R. Carpenter, and Albert Wempner be, and they are hereby, appointed commissioners to locate and mark the state line between the States of Iowa and Illinois, pursuant to the opinion of this court in this cause, at each of the nine bridges across the Mississippi River between these States. And inasmuch as there is an emergency existing therefor, it is ordered that said commissioners proceed at once to ascertain and mark the boundary line between said States at the Keokuk and Hamilton bridge, and report at once their action in that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterward they determine and mark the said state line at the other eight bridges when requested by either party, and report the same. That before entering upon their duties they take and forward to the clerk of this court, to be filed, an oath that they will faithfully perform their duties as such commissioners, under the decision rendered in this cause, to the best of their ability. That the clerk of this court furnish to said commissioners a copy of this order, and the opinion of the court in this cause."

The commissioners filed their report March 30, 1893, as to the boundary line at the bridge mentioned, and on the same day the State of Iowa moved for
*241 an order confirming the report, * counsel making the application being advised that it was consented to on behalf of the State of Illinois. On April 10, 1893, an order was entered in these words: "This cause coming on to be heard upon the application of the State of Iowa for an order confirming the report of the commissioners, presented herein, ascertaining and marking the boundary line between the State of Illinois and the State of Iowa, at the Keokuk and Hamilton bridge at Keokuk, Iowa, it is ordered that the said report be, and the same is hereby, confirmed; and it is further ordered that said commissioners proceed to determine and mark the boundary line between said States throughout its extent, and report thereon to this court, with all convenient speed, and that the order herein entered on March 7, 1893, be, and it is hereby, modified in accordance herewith.

As will be seen, these proceedings were had at October term, 1892. The State of Illinois on October 11, 1893, one of the first days of October term, 1893, by leave of court, moved to set aside the order confirming the report of the

commissioners filed as before stated, upon the ground that notice was not given of the application for the confirmation of said report, and that the consent of the State was signified to the court through mistake and inadvertence. This motion was resisted by the State of Iowa, and numerous affidavits have been filed on both sides.

We are satisfied, upon a careful examination of the papers, that counsel were laboring under misapprehension in the matter of the application for the confirmation, and that the order of the tenth of April was improvidently entered in that the State of Illinois had not received due notice of the application and had not consented to the order. It is unnecessary to rehearse the facts and circumstances which led to the misapprehension. It is objected by the State of Iowa that the order of April 10 was a final finding and decree, and that it cannot be changed or set aside upon motion at a term of court subsequent to that at which it was entered; but we regard the order as interlocutory merely.

The confirmation of the report was but a step in the cause and not a final
*242 decree deciding * and disposing of the whole merits of the cause, and discharging the parties from further attendance. We cannot dispose of the case by piecemeal, and until the boundary line throughout its extent is determined, all orders in the case will be interlocutory.

In the exercise of original jurisdiction in the determination of the boundary line between sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded. Without intimating any opinion on the controversy raised as to the action of the commissioners,

The order of April 10, 1893, so far as it confirms the report in question, will be vacated, and it is so ordered.[1]

State of Virginia v. State of Tennessee.

Supreme Court of the United States, 1895.

[158 *United States*, 267.]

This court is without jurisdiction to enter a consent decree at this term in a cause finally determined at October term, 1893, and improperly retained upon the docket at this term.

THE following papers were presented to the court in support of a motion for a decree in this case:

To G. W. PICKLE, *Attorney General of Tennessee:*

Take notice that the State of Virginia, by R. Taylor Scott, her attor-
*268 ney general, on Monday, the 6th day of May, 1895, * at Washington, D. C., will move the Chief Justice and Associate Justices of the Supreme Court of the United States to enter as a decree of said court in the cause aforesaid the decree in form and substance as set out in the paper *"marked H,"* attached hereto

[1] For the final phase of this case see *Iowa* v. *Illinois* (202 U. S. 59), *post*, p. 1516.—Editor.

and made part and parcel of this notice, said *"paper H"* being the form and substance of a decree as agreed by and between the counsel who represent the parties, plaintiff and defendant, in the aforesaid cause.

THE COMMONWEALTH OF VIRGINIA,
By R. TAYLOR SCOTT, *Attorney General.*

RICHMOND, VA., *April* 15, 1895.

I do hereby accept legal service of the notice hereto attached, dated the 15th day of April, 1895, and consent that the decree in form as thereto annexed shall be made in *this cause;* and I do further agree that this shall be done without amendment to the original bill filed by the State of Virginia in this case, if this can be lawfully done.

Given under my hand this 18th day of April, 1895.

G. W. PICKLE,
Attorney General for Tennessee.

"MARKED H."
SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1894.

THE STATE OF VIRGINIA.
v.
THE STATE OF TENNESSEE. } No. 3, Original.

This day this cause came on to be further heard upon the record heretofore made and motion in writing submitted to the court by the State of Virginia, viz.: That this court, in accordance with its opinion and the decree made in this cause on the 13th day of April, 1893, have laid down, remarked, and defined the boundary line by said decree established between the States of Virginia and Tennessee according to the compact made between them in 1803. On consideration
*269 whereof and with the consent of the complainant, given by her * attorney general, and there being no objection on the part of the State of Tennessee, the court doth adjudge, order, and decree that —— ——, who are hereby appointed special commissioners for that purpose and authorized to do all and singular such acts as may be necessary, to lay down, distinctly remark, and clearly define the boundary line established between the States of Virginia and Tennessee by the compact of 1803, as construed by the opinion and decree of this court made on the 13th day of April, 1893. In executing this decree the court doth direct that the said special commissioners be permitted to use the court's record of this case or such part thereof as they shall find necessary.

The court doth direct that the boundary line aforesaid between Cumberland Gap and White Top Mountain shall be marked at intervals of not over five (5) miles by distinct and durable stone monuments;

That the corner between the States of Virginia and Tennessee upon said mountain be also marked by a durable monument of stone;

That the said boundary line from White Top Mountain through Denton's valley and the country in the record called the "Triangle" shall be marked by stone monuments, so designed, located, and arranged as to make distinct and unmistakable this line;

That stone monuments be placed at the eastern and western limits of the

cities of Bristol, in the States of Virginia and Tennessee, and the said boundary line through said cities be distinctly and clearly marked;

That a corner stone as a monument be placed at Cumberland Gap;

That the said boundary line from Station Creek, near Cumberland Gap, to the western corner on the top of Cumberland Mountain, at proper intervals be marked by stone monuments;

That said special commissioners, as soon as possible after assuming the duties imposed by this decree, do make full report to this court of their action pursuant thereto, and with said report do return a plat and survey of the aforesaid boundary line, monuments, etc.

*270 * And the court doth further order and decree that the costs of said survey, plat, etc., when allowed by this court, shall be paid equally by the parties to this cause—that is to say, one-half thereof by the State of Virginia and the other half thereof by the State of Tennessee.

Mr. R. Taylor Scott, Attorney General of the State of Virginia, for the motion.

Mr. Chief Justice Fuller delivered the opinion of the court.

This was a suit to establish the true boundary line between the States of Virginia and Tennessee, and proceeded to a decree on April 3, 1893, at October term, 1892, "that the boundary line established between the States of Virginia and Tennessee by the compact of 1803, between the said States, is the real, certain, and true boundary between the said States, and that the prayer of the complainant to have the said compact set aside and annulled, and to have a new boundary line run between them on the parallel 36° 30′ north latitude, should be, and the same is hereby, denied, at the costs of the complainant."

In view of some observations made, on the argument of the case, upon the propriety and necessity, if the line established in 1803 were sustained, of having it rerun and remarked, so as thereafter to be more readily identified and traced, it was stated in the opinion "that on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the line." *Virginia* v. *Tennessee,* 148 U. S. 503, 528. Subsequently, on May 15, 1893, a motion was made on behalf of the State of Virginia to restore the boundary marks between the two States alleged to be indistinct and obliterated, and to allow complainant to take additional testimony, the consideration of which was postponed to

*271 October term, 1893, when and on * October 16, 1893, the motion was denied. Application is now made on behalf of the State of Virginia to this court to enter a decree in this cause for the remarking of the boundary line as set forth therein, to the granting of which the State of Tennessee consents. But we find ourselves unable to enter the order desired, as our power over the cause ceased with the expiration of October term, 1893, and it should not have been retained on the docket. The application must therefore be denied, but without prejudice to the filing of a new bill or petition, upon which, the parties being properly before the court and agreeing thereto, such a decree may be entered.

Application denied and case stricken from the docket.[1]

[1] For the succeeding phase of this case see *Tennessee* v. *Virginia* (177 U. S. 501), *post,* p. 1283.—Editor.

State of Indiana v. State of Kentucky.

Supreme Court of the United States, 1895.

[159 *United States*, 275.]

The court appoints commissioners to run the disputed boundary line in accordance with its decision, announced May 19, 1890, 136 U. S. 479.

At October Term, 1889, this court decided a case of disputed boundary between the State of Indiana and the State of Kentucky. 136 U. S. 479. At the present term the parties presented the following petition:

"To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

"The plaintiff, The State of Indiana, and the defendant, The State of Kentucky, show to your honors that they have agreed upon and submit herewith the accompanying draft of an order in conformity to the opinion and order
*276 of * the Court herein and move for an order in accordance therewith.

"The State of Indiana,
By *William A. Ketcham,*
its Attorney General.
"The State of Kentucky,
By *Richard H. Cunningham,*
its Solicitor.

"Washington, D. C., *October* 15, 1895.

"in the supreme court of the united states, october term, 1895.

"The State of Indiana
vs.
The State of Kentucky. } Original, No. 2.

"On this 15th day of October, 1895, comes The State of Indiana, by its attorney general, and also comes The State of Kentucky, by its solicitor, Richard H. Cunningham, and said parties advise and inform the Court that in accordance with the opinion and order hereinbefore entered in that behalf they have agreed upon the following-named gentlemen to be suggested to this Court as commissioners, as stated and set forth in said opinion and order, viz.: Gustave V. Menzies, of Mount Vernon, Ind.; Gaston M. Alves, of Henderson, Ky., and Col. Amos Stickney, of the Engineer Corps of the United States Army; and the Court, being fully advised in the premises, does now order and decree that the above-named Gustave V. Menzies, Gaston M. Alves, and Amos Stickney be, and they are hereby, appointed commissioners to ascertain and run the boundary line between the said States of Indiana and Kentucky as designated in the said opinion of this Court heretofore entered herein, and to report to this Court with all reasonable dispatch their doings in that behalf. It is further ordered by the Court that duly certified copies of this order shall be forthwith issued by

the clerk of this Court, under his hand and seal, to each of the above-named commissioners, and before entering upon the discharge of their duties as
*277 such commissioners, they and * each of them shall be and appear before either the clerk of this Court or the clerk of the United States Circuit Court within and for either the district of Indiana, Kentucky, or Ohio and take an oath faithfully to discharge the duties required of them as such commissioners, which oaths shall be transmitted to and filed with the clerk of this court and in this cause."

Mr. William A. Ketcham, Attorney General of the State of Indiana, for plaintiff.

Mr. Richard H. Cunningham for defendant.

The Chief Justice.

This cause coming on on the application of the State of Indiana, by its attorney general, and of the State of Kentucky, by its solicitor, Richard H. Cunningham, for the appointment of commissioners herein, in accordance with the opinion, judgment, and decree hereinbefore filed and entered, and the court being advised and informed by said parties that they have agreed upon the following-named gentlemen to be suggested to this court for such appointment, viz.: Gustave V. Menzies, of Mount Vernon, Indiana; Gaston M. Alves, of Henderson, Kentucky; and Col. Amos Stickney, of the Engineer Corps of the United States Army; and the court, being fully advised in the premises, does now order and decree that the above-named Gustave V. Menzies, Gaston M. Alves, and Amos Stickney be, and they are hereby, appointed commissioners to ascertain and run the boundary line between the said States of Indiana and Kentucky as designated in the said opinion of this court heretofore filed, and judgment and decree heretofore entered herein, and to report to this court with all reasonable dispatch their doings in that behalf. It is further ordered by the court that duly certified copies of this order shall be forthwith issued by the clerk of this court, under his hand and the seal of the court, to each of the above-named commissioners, and before entering upon the discharge of
*278 their duties as such commissioners they, and * each of them, shall be and appear before either the clerk of this court or the clerk of the United States Circuit Court within and for either the District of Indiana, Kentucky, or Ohio and take an oath faithfully to discharge the duties required of them as such commissioners, which oaths shall be forthwith transmitted to and filed with the clerk of this court and in this cause.[1]

[1] For the succeeding phase of this case see *Indiana* v. *Kentucky* (163 U. S. 520), *post,* p. 1235.—Editor.

United States v. State of New York.

State of New York v. United States.

Supreme Court of the United States, 1896.

[160 *United States,* 598.]

Any claim made against an Executive Department, "involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States," may be transmitted to the Court of Claims by the head of such Department under Rev. Stat., § 1063, for final adjudication; provided, such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.

*599 Any claim embraced by Rev. Stat., § 1063, without regard to its amount, and * whether the claimant consents or not, may be transmitted under the act of March 3, 1883, c. 116, to the Court of Claims by the head of the Executive Department in which it is pending, for a report to such Department of facts and conclusions of law for "its guidance and action."

Any claim embraced by that section may, in the discretion of the Executive Department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the Court of Claims, under the act of March 3, 1887, c. 359, without regard to the amount involved, for a report, merely advisory in its character, of facts or conclusions of law.

In every case, involving a claim of money, transmitted by the head of an Executive Department to the Court of Claims under the act of March 3, 1883, c. 116, a final judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court, at the time such claim was filed in the Department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication.

Whether the words "or matter" in the second section of that act embrace any matters, except those involving the payment of money, and of which the Court of Claims under the statutes regulating its jurisdiction could, at the voluntary suit of the claimant, take cognizance for purposes of final judgment or decree, is not considered.

As the claim of the State of New York, the subject of controversy in this case, was presented to the Treasury Department before it was barred by limitation, its transmission by the Secretary of the Treasury to the Court of Claims for adjudication was only a continuation of the original proceeding commenced in that Department in 1862; and the delay by the Department in disposing of the matter before the expiration of six years after the cause of action accrued, could not impair the rights of the State.

The $91,320.84 paid by the State of New York for interest upon its bonds issued in 1861 to defray the expenses to be incurred in raising troops for the national defense was a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon.

The claim of the State of New York for money paid on account of interest to the commissioners of the Canal Fund, is not one against the United States for interest as such, but

is a claim for costs, charges and expenses properly incurred and paid by the State in aid of the general government, and is embraced by the act of Congress declaring that the States would be indemnified by the general government for money so expended.

THE case is stated in the opinion.

*600 *Mr. David B. Hill* for the State of New York. *Mr. T. * E. Hancock,* Attorney General of the State of New York, was on his brief.

Mr. Assistant Attorney General Whitney for the United States. *Mr. Assistant Attorney General Dodge* was on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 3d day of January, 1889, the Secretary of the Treasury transmitted to the Court of Claims all the papers and vouchers relating to a claim of the State of New York against the United States, then pending in the Treasury Department, for interest paid on money borrowed and expended in enrolling, subsisting, clothing, supplying, arming, and equipping troops for the suppression of the rebellion of 1861. That claim, the Secretary certified, involved controverted questions of law, and exceeded three thousand dollars in amount. The communication accompanying the papers stated that the case was transmitted to the Court of Claims under and by authority of section 1063 of the Revised Statutes, to be there proceeded in according to law.

In further prosecution of this claim, the State promptly filed its petition in the court below and asked judgment against the United States for the sum of $131,188.02 with interest from the first day of July, 1862, together with such other relief as would be in conformity with law.

This claim was based on the act of Congress of July 27, 1861, c. 21, providing that "the Secretary of the Treasury be, and he is hereby directed, out of any money in the Treasury not otherwise appropriated, to pay to the Governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury." 12 Stat. 276.

*601 By a joint resolution of Congress, approved March 8, 1862, * it was declared that the above act should be construed "to apply to expenses incurred as well after as before the date of the approval thereof." 12 Stat. 615.

Before July 4, 1861, the State of New York—pursuant to a statute passed by its legislature April 15, 1861, c. 277—enlisted, enrolled, armed, equipped, and caused to be mustered into the military service of the United States for the period of two years or during the war thirty thousand troops to be employed in suppressing the rebellion. That statute provided that all expenditures for arms, supplies or equipments necessary for such forces should be made under the direction of the Governor and other named officers, and that the moneys therefor should, on the certificate of the Governor, be drawn from the treasury

on the warrant of the comptroller in favor of such person or persons as from time to time were designated by the Governor; and the sum of $3,000,000, or so much thereof as was necessary, was appropriated out of any moneys in the treasury not otherwise appropriated to defray the expenses authorized by that act, or any other expenses of mustering the militia of the State or any part thereof into the service of the United States. That act also imposed, for the fiscal year commencing on the 1st day of October, 1861, a state tax to meet the expenses authorized, not to exceed two mills on each dollar of the valuation of real and personal property in the State. Laws of N. Y. 84th Session, 1861, page 634.

There was no money in the treasury of the State in 1861 that had not been specifically appropriated for the expenses of the state government; none that could have been used to defray the expenses of enlisting, enrolling, arming, equipping, and mustering troops into the service of the United States.

Under the laws of the State the moneys authorized to be raised by the act of April 15, 1861, did not reach the state treasury and were not available for use until the months of April and May, 1862.

The total state tax rate fixed at the session of the legislature beginning on the first Tuesday in January, 1861, was 3⅛ mills, of which 1½ mills was the
*602 amount authorized by the above * statute of 1861. The moneys realized from this tax were paid into the state treasury during the year 1862.

The State had no other means of raising the money required for the purpose of immediately defraying the expenses of enlisting, enrolling, arming, equipping, and mustering in such troops, except by borrowing money in anticipation of the collection of its taxes; and between June 3, 1861, and July 2, 1861, in order to provide for the public defence, it issued bonds in anticipation of such taxes to the amount of $1,250,000, payable on July 1, 1862, except that $100,000 was made payable June 1, 1862, at the rate of seven per cent per annum, which at that time was the legal rate of interest under the laws of the State.

The issuing of these bonds was necessary for the purpose of providing the money required, and upon their sale the full amount of their face value was received and was used and applied by the State, together with other moneys, in raising troops. The entire sum so expended between the 23d day of April, 1861, and the 1st day of January, 1862, was $2,873,501.19 exclusive of interest upon the bonds or loans made by the State for that purpose.

In addition to the above sums, the State during the years 1861 and 1862 paid, on account of interest that accrued on its bonds issued in anticipation of the tax for the public defence, the sum of $91,320.84.

By a statute of New York of April 12, 1862, the legislature specifically appropriated the sum of $1,250,000 for the redemption of comptroller's bonds issued for loans in anticipation of the tax imposed by the act of April 15, 1861, c. 192, and the additional sum of $91,320.84 for the payment of the accruing interest on those bonds. Laws of N. Y. 1862, 85th Session, 364.

Of the remainder of the above sum of $2,873,501.19 necessarily expended by the State of New York for the purpose stated, between April 23, 1861, and January 1, 1862, after deducting the amount of $1,250,000 raised by issuing bonds, $1,623,501.19 was taken from the Canal Fund of the State. That Fund,

*603 under the constitution of the State, was a Sinking * Fund for the ultimate payment of what is known as the canal debt. Const. N. Y. 1846, Art. VII, Sec. 1.

Under the tax rate of 1860 there had been levied and collected and paid into the treasury of the State the sum of $2,039,663.06 for the benefit of and to the credit of the Canal Fund. That sum reached the state treasury in April and May, 1861, subject to be invested by the state officers pursuant to the requirements of law and the constitution of the State, in securities for the benefit of the Canal Fund. On May 21, 1861, the lieutenant governor, comptroller, treasurer, and the attorney general, constituting the commissioners of the Canal Fund, authorized the comptroller to use $2,000,000 of the Canal Fund moneys for military purposes until the 1st of October next, and $1,000,000 until the 1st day of January, 1862, at five per cent; and of this amount the sum of $1,623,501.19 was used by the comptroller for the purpose of defraying the expenses of raising and equipping such troops. The following was the order: "State of New York, Canal Department, Albany, May 21, 1861. The comptroller is to be permitted to use two millions of dollars of the Canal Fund moneys for military purposes until the first day of October next, when the commissioners of the Canal Fund will invest one million of dollars of the Canal Sinking Fund under section 1, article VII, in the tax levied for military purposes until the 1st of July, 1862, at five per cent, and the comptroller may use one million of dollars of the tax levied to pay interest on the $12,000,000 debt until the 1st of January, 1862, when the commissioners will, if they have the means, replace that or as large an amount as they may have the means to do it with from the toll of the next fiscal year, so as that the whole advance from the Canal Fund on account of the tax to be two millions of dollars. It is understood the comptroller will retain the taxes now in process of collection for canal purposes until the above investments are made, paying the funds five per cent interest therefor." This order was signed by the commissioners of the Canal Fund.

On December 28, 29, and 31, 1861, the United States repaid to the *604 State, on account of moneys so expended by the latter, * the sum of $1,113,000 which sum with interest was placed in the Canal Fund on April 4, 1862. This left $510,501.19 unpaid of the moneys used from the Canal Fund.

The amount of interest at 5 per cent. per annum on the moneys of the Canal Fund during the time it was used by the State in raising troops was $48,187.13. But during the same time the State had received interest on portions of those moneys, while it was lying in bank unused, to the amount of $8319.95, and the net deficiency of the State on account of interest on such moneys during the period when they were so used was $39,867.18, which sum was paid into the Canal Fund from the state treasury.

The total amount paid by the State for interest upon its bonds issued in anticipation of the tax for the public defence, and upon the moneys of the Canal Fund used for the purpose of defraying the expenses of raising and equipping troops, was $131,188.02. No part of that sum has been paid by the United States.

The moneys above specified as actually expended by the State of New York were necessarily expended for the purpose of enlisting, enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting such troops and causing them to be mustered into the military service of the United States,

and were so paid and expended at the request of the civil and military authorities of the United States.

Prior to January 3, 1889, the State had presented, from time to time, various claims and accounts to the Treasury Department of the United States for charges and expenses incurred by it in enlisting, enrolling, arming, equipping, and mustering troops into the military service of the United States. Those claims amounted in the aggregate to $2,950,479.46, and included charges for all the moneys paid and placed as hereinbefore specified. The department, from time to time, allowed thereon various sums aggregating $2,775,915.24, leaving a balance of $174,564.22 not allowed, and the claims for which were pending in the Department unadjusted when this case was transmitted to the Court of Claims on the 3d day of January, 1889. Of that sum of
*605 $174,564.22 the sums * hereinbefore specified, amounting to $131,188.02, constituted a part.

The claim of the State for expenditures in furnishing troops with clothing and munitions of war was filed in the Treasury Department in May, 1862, and included the above items of interest. The claim for interest has from that time been suspended in the Department, and was so suspended at the time it was transmitted to the Court of Claims.

The court, after finding the facts substantially as above stated, gave judgment in favor of the State for $91,320.84, on account of interest paid upon its bonds issued in anticipation of taxes imposed for the public defence. From that judgment the United States appealed. The State also appealed, and claims that it was entitled to judgment for the additional sum of $39,867.13 paid into what is called the Canal Fund as interest upon the moneys it had borrowed from that fund to be repaid with interest.

The Government moved to dismiss the State's appeal, its contention being that the judgment brought here by the State for review is not obligatory in character and appealable, but only ancillary and advisory. This motion assumes that the court below was without jurisdiction under existing legislative enactments to render a final judgment, reviewable by this court, upon any claim, whatever its amount, made against an Executive Department and transmitted to the Court of Claims to be there proceeded in according to law.

We recognize the importance of the question thus presented, and have bestowed upon it the most careful consideration. Its solution can be satisfactorily reached only by an examination of the various statutes regulating the jurisdiction of the Court of Claims, including those known as the Bowman act of March 3, 1883, c. 116, 22 Stat. 485, and the Tucker act of March 3, 1887, c. 359, 24 Stat. 505.

By the act of Congress of July 27, 1861, c. 21, the Secretary of the Treasury was directed, out of any money in the Treasury not otherwise appropriated, and upon vouchers to be passed upon by the accounting officers of that De-
*606 partment, to pay the * costs, charges, and expenses properly incurred by any State in enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops to be employed in suppressing the rebellion of 1861. 12 Stat. 276.

The claim of New York was founded on the above act of Congress of July 27, 1861, if not on contract with the United States. It was transmitted by the Secretary of the Treasury to the Court of Claims under section 1063 of the Revised Statutes as one involving controverted questions of law.

By the act of June 25, 1868, c. 71, § 7, the jurisdiction of the Court of Claims was enlarged so as to embrace several classes of claims that might be transmitted to it by the head of an Executive Department for adjudication. 15 Stat. 75, 76.

The provisions of that act were preserved in section 1063 of the Revised Statutes which is as follows: "Sec. 1063. Whenever any claim is made against any Executive Department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided,* That no case shall be referred by any head of a Department unless it belongs to one of the several classes of
*607 cases which, by reason of the subject-matter and character, * the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."

It is clear that under this section no claim against an Executive Department, not otherwise described than as one "involving disputed facts or controverted questions of law," could be transmitted to the Court of Claims for adjudication unless the amount in controversy exceeded three thousand dollars. It is equally clear that that section did not make the amount jurisdictional where a claim of that class is transmitted as one the decision of which would affect a class of cases, or furnish a precedent for the action of the Executive Department in adjusting a class of cases, nor where any authority, right, privilege, or exemption was claimed or denied under the Constitution of the United States. But, as bearing on the inquiry to be presently made whether that section was superseded by subsequent enactments, it should be here noted that there might be claims in the hands of an Auditor or of the Comptroller of the Treasury for examination, which in the first instance were to be passed on by some other Department than that of the Treasury. Claims of that special class could not be transmitted by the Secretary of the Treasury to the Court of Claims, under section 1063 of the Revised Statutes, for adjudication, except "upon the certificate of the Auditor or Comptroller of the Treasury," having it under examination. This is indicated not only by the words of that section, but by sections 1064 and 1065, the first of which sections provides that "all cases transmitted by the head of any Department, *or* upon the certificate of any Auditor or Comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations;" and the latter, that "the amount of any final judgment or decree rendered in favor of

the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court."

*608 We come now to what is known as the Bowman act of March 3, 1883, c. 116, entitled "An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government." 22 Stat. 485.

By the first section of that act it is provided: "Sec. 1. Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or House may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the House by which the case was transmitted for its consideration."

The second section is in these words: "Sec. 2. When a claim or matter is pending in any of the Executive Departments which may involve controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the Department by which it was transmitted for its guidance and action."

As the Bowman act contains no words of express repeal, the question arises whether, by necessary implication, its second section superseded section 1063 of the Revised Statutes, in respect of claims transmitted by an Executive Department to the Court of Claims.

The Court of Claims was required by section 1063 of the Revised Statutes to adjudicate any claim, properly transmitted from an Executive Department, by a final judgment, while the Bowman act prohibited any judgment being

*609 entered for * or against a claim transmitted under that act; the duty of the court, in cases involving controverted questions of fact or law, transmitted to and heard by it under the Bowman act, being only to report its findings of fact and conclusions of law to the proper Department, for "its guidance and action."

It is, nevertheless, suggested that the Bowman act, although without words of repeal, covers the entire subject of claims involving controverted questions of fact or law that may be transmitted to the Court of Claims from an Executive Department, and, it is argued, that we must apply the rule that a prior statute is to be regarded as repealed or modified where "the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute." *Frost* v. *Wenie,* 157 U. S. 46, 58.

If that act be held to have displaced the whole of section 1063 of the Revised Statutes (except the clause relating to claims transmitted by the Sec-

retary of the Treasury, upon the certificate of an Auditor or of the Comptroller of the Treasury) the result would be that after its passage the Court of Claims was wholly without jurisdiction to render *judgment* on any claim for money transmitted from an Executive Department, whatever its nature or amount. Such a construction would exclude from judicial cognizance by that court not only claims exceeding $3000 in amount, and specifically designated as claims involving controverted questions of law and fact, but even claims the determination of which would affect a class of cases, or furnish a precedent for the future action of an Executive Department, and claims that involved an authority, right, privilege, or exemption asserted or denied under the Constitution of the United States. Congress, when it passed the Bowman act, must have had in view the provisions of section 1063 of the Revised Statutes under which the Court of Claims had so long exercised jurisdiction of claims for money made against an Executive Department and transmitted to that court for final adjudication. As the Bowman act makes no reference to that section, and contains no words of repeal, we cannot suppose that Congress
*610 intended to take from the * Court of Claims jurisdiction to render judgment in cases coming before it under the Revised Statutes. The object of that act is expressed in its title, and was to afford assistance and relief to Congress and the Executive Departments in the *investigation* of claims and demands against the Government. To that end, and in respect of claims and demands involving controverted questions of fact or law and pending in the Executive Departments, authority was given to the heads of such Departments upon their own motion, and whether the claimant desired it or not, to obtain, for their "guidance and action," findings of fact and conclusions of law, without regard to the amount involved. *Billings* v. *United States,* 23 C. Cl. 166, 174. Neither expressly nor by necessary implication did that act take from an Executive Department the right to send to the Court of Claims, for *final adjudication,* any claim made against it that was embraced by section 1063 of the Revised Statutes. So far as the Bowman act related to claims for money pending in an Executive Department it only authorized the head of the Department to send them to that court for a report of facts and conclusions that would not have the force of a judgment reviewable by this court. In this view, there is no conflict between the Bowman act and the Revised Statutes. As there are no words of repeal in the Bowman act, we have given it such construction as will make it consistent with previous legislation, and thus avoid the abrogation of existing statutes which Congress had not repealed either expressly or by necessary implication. The second section of the Bowman act should be construed as if it were a proviso to section 1063 of the Revised Statutes. Thus construed the later statute is not in conflict with the earlier one.

We turn now to the act of March 3, 1887, c. 359, known as the Tucker act, entitled "An act to provide for the bringing of suits against the Government of the United States." 24 Stat. 505.

The first section of that act gives the Court of Claims original jurisdiction to hear and determine all claims founded upon the Constitution of the United
*611 States or any law of Congress, * except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliqui-

dated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: nothing, however, in that section to be construed as giving to any of the courts mentioned in the act jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," nor other claims theretofore rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same. Jurisdiction was also given of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant. It also provided that no suit against the Government of the United States should be allowed under that act unless the same was brought within six years after the right accrued for which the claim is made.

Other sections of that act are as follows:

"SEC. 12. Then when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, *with the consent of the claimant,* may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.

"SEC. 13. That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled 'An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' approved March third, eighteen hundred and eighty-three [the Bowman act], if it shall ap-
*612 pear to the satisfaction of the court, * upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court." By its sixteenth section all laws and parts of laws inconsistent with that act were repealed.

What is the scope of the twelfth section of the Tucker act? Did that section supersede section 1063 of the Revised Statutes, or section two of the Bowman act?

It is difficult to tell what was intended by the words "with the consent of the claimant," in the twelfth section of the Tucker act. If Congress intended that no claim, large or small in amount, involving controverted questions of fact or law, and pending in an Executive Department, should be transmitted to the Court of Claims, except with the consent of the claimant, that intention would have been expressed in words that could not have been misunderstood; for that court had long exercised jurisdiction in cases of that kind. But, in view of the words used, no such purpose can be imputed to Congress. The Tucker act cannot be held to have taken the place of section two of the Bowman act; for section thirteen of the Tucker act distinctly provides for *judgment in every case* then pending in or which might come before the Court of Claims *under the Bowman act,* of which that court could have taken judicial cognizance if

the case had been commenced originally by suit instituted in that court by the claimant. That Congress did not intend to supercede the Bowman act is made still more apparent by the fourteenth section of the Tucker act, declaring "that whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the house in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same *in accordance with the provisions of the act* approved
*613 March third, eighteen hundred and eighty-three, entitled 'An * act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' [the Bowman act] and report to such House the facts in the case and the amount, where the same can be liquidated, etc." It thus appears that any bill, except for a pension, in either House of Congress, providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, may be transmitted to the Court of Claims, to be proceeded in, not, let it be observed, under the Tucker act, but under the Bowman act of March 3, 1883, and to report the facts, etc., to such House. It is impossible, therefore, to hold that the Tucker act displaced or repealed the second section of the Bowman act.

In our opinion the twelfth section of the Tucker act should be construed as not referring to claims which an Executive Department, proceeding under section 1063 of the Revised Statutes, seeks to have finally adjudicated by the Court of Claims, nor to claims described in that section, in respect of which the Department, upon its own motion, and whether the claimant consents or not, desires from that court a report under the Bowman act, of facts and law for its guidance and action. It refers only to claims which the head of an Executive Department, with the expressed consent of the claimant, may send to the Court of Claims in order to obtain a report of facts and law which the Department may regard as only advisory. It no doubt often happened that the head of a Department did not desire action by the Court of Claims in relation to a particular claim, but, in order to meet the wishes of the claimant, was willing to have a finding by that court which was not followed by a judgment, nor by any report for the guidance and action of the Department. So that section 1063 of the Revised Statutes, the second section of the Bowman act, and the twelfth section of the Tucker act may be regarded as parts of one general system, covering different states of case, and standing together without conflict in any essential particular.

*614 The claim of New York, being for money and founded on * an act of Congress, was within the general jurisdiction of the Court of Claims. If not barred by limitation it could, in the discretion of the Secretary of the Treasury, have been transmitted or certified to the Court of Claims under the Bowman act after its passage for a finding of facts or law, and that court, when the Tucker act came into operation, could, under its thirteenth section, have rendered a final judgment, sending, however, to the Treasury Department a report of its proceedings. But the Secretary of the Treasury, in the exercise of an authority given him by statute and never withdrawn, chose to certify or transmit this claim to the Court of Claims, under section 1063 of the Revised Statutes, for final adjudication.

Touching the suggestion that the twelfth section of the Tucker act entirely

superseded the second section of the Bowman act, it may be further observed that the Tucker act repeals only such previous statutes as were inconsistent with its provisions. There is no inconsistency between the sections just named; one, as we have said, the second section of the Bowman act, relating to claims involving controverted questions of fact or law, which an Executive Department may transmit to the Court of Claims without consulting the wishes of the claimant, in order to obtain a report of facts and law for its guidance and action; the other, the twelfth section of the Tucker act, relating to claims of the same class transmitted to that court with the expressed consent of the claimant in order to obtain a report of facts and law that would be only advisory in its character.

The object of the thirteenth section of the Tucker act is quite apparent. A case transmitted under the Bowman act is, we have seen, one in which the findings of fact and law are made for the guidance and action of the Executive Department from which it came, and, therefore, a rendition of judgment, in such a case, if it be one of which the court could at the outset have taken cognizance at the voluntary suit of the claimant, would be a saving of time for all concerned. If the cases embraced by the twelfth section of the Tucker act
*615 were only those provided for by the second section of the * Bowman act, the thirteenth section of the Tucker act, authorizing a final judgment or decree where the claim was one of which the court could originally have taken jurisdiction for purposes of final adjudication, would not have made special reference to cases coming before the Court of Claims under the Bowman act.

Our conclusions, then, as to the several statutes under examination, so far as they relate to claims pending in an Executive Department, are—

First. Any claim made against an Executive Department, "involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States," may be transmitted to the Court of Claims by the head of such department under section 1063 of the Revised Statutes for final adjudication; provided, such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.

Second. Any claim embraced by section 1063 of the Revised Statutes, without regard to its amount, and whether the claimant consents or not, may be transmitted under the Bowman act to the Court of Claims by the head of the Executive Department in which it is pending, for a report to such department of facts and conclusions of law for "its guidance and action."

Third. Any claim embraced by that section may, in the discretion of the Executive Department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the Court of Claims, under the Tucker act, without regard to the amount involved, for a report, merely advisory in its character, of facts or conclusions of law.

*616 Fourth. In every case, involving a claim of money, transmitted * by the

head of an Executive Department to the Court of Claims under the Bowman act, a final judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court, at the time such claim was filed in the department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication.

Whether the words "or matter" in the second section of the Bowman act embrace any matters, except those involving the payment of money, and of which the Court of Claims under the statutes regulating its jurisdiction could, at the voluntary suit of the claimant, take cognizance for the purposes of final judgment or decree, need not be now considered.

It results that as the claim of New York exceeded three thousand dollars, and was certified under section 1063 of the Revised Statutes as one involving controverted questions of law, the court below had jurisdiction to proceed to a final judgment, unless, as suggested by the Assistant Attorney General, the claim when transmitted to the Court of Claims by the Secretary of the Treasury was barred by limitation.

At the time the claim of New York was filed in the Treasury Department there was no statute of limitations in force expressly applicable to cases in the Court of Claims. But by the act of March 3, 1863, c. 92, § 10, it was provided that (with certain exceptions that have no application to this case) every claim against the United States, cognizable by the Court of Claims, should be barred unless the petition setting forth a statement of it was filed in or transmitted to that court within six years after the claim first accrued; claims that had accrued before the passage of that act not to be barred, if filed or transmitted as above stated, within three years after the passage of the act. 12 Stat. 765, 767. This limitation of six years was preserved in the Revised Statutes and in the Tucker act. Rev. Stat. § 1069; 24 Stat. 505.

Was the claim of New York barred because more than six years passed after it accrued before it was transmitted to the Court of Claims? In *Finn* v. *United States,* 123 U. S. 227, 232, * this court said: "The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous." To the same effect was *DeArnaud* v. *United States,* 151 U. S. 483, 495.

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But, in *United States* v. *Lippitt,* 100 U. S. 663, 668, 669, where the question was whether a claim that accrued in 1864, and which was presented to the War Department in 1865, and in 1878 was transmitted to the Court of Claims as one involving controverted questions of law, the decision whereof would

affect a class of cases, the court said: "Limitation is not pleadable in the Court of Claims, against a claim cognizable therein, and which has been referred by the head of an Executive Department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued, that is, within six years after suit could be commenced thereon against the Government. Where the claim is of such a character that it may be allowed and settled by an Executive Department, or may, in the discretion of the head of such department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such cases, the statement of the facts, upon which the claim
*618 rests, in the forms of a petition, is only another mode of asserting * the same demand which had previously and in due time been presented at the proper department for settlement. These views find support in the fact that the act of 1868 describes claims presented at an Executive Department for settlement, and which belong to the classes specified in its seventh section, *as cases* which may be transmitted to the Court of Claims. 'And all the cases mentioned in this section, which shall be transmitted by the head of any Executive Department, or upon the certificate of any auditor or comptroller, shall be *proceeded in* as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations,' with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the Government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the Court of Claims they are to be 'proceeded in as other cases in said court.'"

The same principle was recognized in *Finn* v. *United States,* 123 U. S. 227, 232, in which case the court, referring to the act of 1863, limiting the time for bringing suits in the Court of Claims, also said: "The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that—except where the claimant labors under some of the disabilities specified in the statutes—the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the Government."

Upon the authority of those cases we adjudge that as the claim of New York was presented to the Treasury Department before it was barred by limitation, its transmission by the Secretary of the Treasury to the Court of Claims for adjudication was only a continuation of the original proceeding commenced in that department in 1862. The delay by the department in disposing of the matter before the expiration of six years after the cause of action accrued,
*619 could not impair the * rights of the State. Of course, if the claim had not been presented to the Treasury Department before the expiration of that period the Court of Claims could not have entertained jurisdiction of it.

For the reasons we have stated the motion of the United States to dismiss the appeal of the State is denied, and we proceed to the examination of the case upon its merits.

The entire sum for which the State asked judgment was $131,188.02, of which $91,320.84 represented the amount paid as interest on moneys borrowed

for the purpose of raising troops for the national defence, and for the repayment of which, with interest at seven per cent, the State executed its short-time bonds. The balance, $39,867.18, represented the amount paid as interest on moneys received by way of loan from the Canal Fund and applied by the State for the same purpose.

On behalf of the Government it is contended that payment by the United States of the above sum of $91,320.84 is prohibited both by the statute, act of March 3, 1863, c. 92, 12 Stat. 765, Rev. Stat. § 1091, providing that interest shall not be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, and by the general rule based on grounds of public convenience, that interest "is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers." *United States* v. *North Carolina,* 136 U. S. 211, 216; *Angarica* v. *Bayard,* 127 U. S. 251, 260.

The allowance of the $91,320.84 would not contravene either the statute or the general rule to which we have adverted. The duty of suppressing armed rebellion having for its object the overthrow of the National Government, was primarily upon that Government and not upon the several States composing the Union. New York came promptly to the assistance of the National Government by enrolling, subsisting, clothing, supplying, arming, equipping, paying,
*620 and transporting troops to be employed in putting down the rebellion. * Immediately after Fort Sumter was fired upon, its legislature passed an act appropriating $3,000,000, or so much thereof as was necessary, out of any moneys in its treasury not otherwise appropriated, to defray any expenses incurred for arms, supplies, or equipments for such forces as were raised in that State and mustered into the service of the United States. In order to meet the burdens imposed by this appropriation, the real and personal property of the people of New York were subjected to taxation. When New York had succeeded in raising thirty thousand soldiers to be employed in suppressing the rebellion, the United States, well knowing that the national existence was imperilled, and that the earnest coöperation and continued support of the States was required in order to maintain the Union, solemnly declared by the act of 1861, that "the costs, charges, and expenses properly incurred" by any State in raising troops to protect the authority of the nation, would be met by the General Government. And to remove any possible doubt as to what expenditures of a State would be so met, the act of 1862 declared that the act of 1861 should embrace expenses incurred before, as well as after, its approval. It would be a reflection upon the patriotic motives of Congress if we did not place a liberal interpretation upon those acts, and give effect to what, we are not permitted to doubt, was intended by their passage. Before the act of July 27, 1861, was passed the Secretary of State of the United States telegraphed to the governor of New York, acknowledging that that State had then furnished fifty thousand troops for service in the war of the rebellion, and thanking the governor for his efforts in that direction. And on July 25, 1861, Secretary Seward telegraphed: "Buy arms and equipments as fast as you can. We pay all." And on July 27, 1861, that "Treasury notes for part advances will be furnished on your call for them." On August 16, 1861, the Secretary of War telegraphed to the governor of New York: "Adopt such measures as may be

necessary to fill up your regiments as rapidly as possible. We need the men. Let me know the best the Empire State can do to aid the country in the
*621 present emergency." And on February 11, * 1862, he telegraphed: "The Government will refund the State for the advances for troops as speedily as the Treasurer can obtain funds for that purpose." Liberally interpreted, it is clear that the acts of July 27, 1861, and March 8, 1862, created, on the part of the United States, an obligation to indemnify the States for *any* costs, charges, and expenses *properly incurred* for the purposes expressed in the act of 1861, the title of which shows that its object was "to *indemnify* the States for expenses incurred by them in defence of the United States."

So that the only inquiry is whether, within the fair meaning of the latter act, the words "costs, charges, and expenses properly incurred" included interest paid by the State of New York on moneys borrowed for the purpose of raising, subsisting, and supplying troops to be employed in suppressing the rebellion. We have no hesitation in answering this question in the affirmative. If that State was to give effective aid to the General Government in its struggle with the organized forces of rebellion, it could only do so by borrowing money sufficient to meet the emergency; for it had no money in its treasury that had not been specifically appropriated for the expenses of its own government. It could not have borrowed money any more than the General Government could have borrowed money, without stipulating to pay such interest as was customary in the commercial world. Congress did not expect that any State would decline to borrow and await the collection of money raised by taxation before it moved to the support of the nation. It expected that each loyal State would, as did New York, respond at once in furtherance of the avowed purpose of Congress, by whatever force necessary, to maintain the rightful authority and existence of the National Government. We cannot doubt that the interest paid by the State on its bonds, issued to raise money for the purposes expressed by Congress, constituted a part of the costs, charges, and expenses properly incurred by it for those objects. Such interest, when paid, became a principal sum, as between the State and the United States, that is, became a part of the aggregate sum
*622 properly paid by the State for the United States. The principal and * interest, so paid, constitutes a debt from the United States to the State. It is as if the United States had itself borrowed the money, through the agency of the State. We therefore hold that the court below did not err in adjudging that the $91,320.84 paid by the State for interest upon its bonds issued in 1861 to defray the expenses to be incurred in raising troops for the national defence was a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon.

The Court of Claims disallowed so much of the State's demand as represented interest paid by it on moneys borrowed from the Canal Fund. The instalment of interest paid into that Fund by the State was $48,187.13. But as the State itself earned interest to the amount of $8319.95 on a part of the money obtained by it from the commissioners of the Canal Fund, it only claimed $39,867.18 on account of interest paid to that Fund.

The Canal Fund was made by the constitution of the State a sinking fund for the ultimate liquidation of what is known as the canal debt of New York. In

April and May, 1861, $2,039,663.06 from the taxes of 1860 reached the treasury of the State, and under the constitution and laws of New York that amount should have been invested in securities for the benefit of the Canal Fund, and the interest derived from those securities paid into the Fund. The State was permitted to use a part of the above sum under an agreement by its officers that interest thereon at the rate of five per cent should be paid. It recognized and fulfilled that agreement, and now claims that the interest it so paid to the Canal Fund constituted a charge or expense properly incurred in raising, subsisting, and supplying troops to suppress the rebellion.

We are of opinion that, so far as the question of the liability of the United States is concerned, there is, on principle, no difference between the claim for $91,320.84 and the claim for $39,867.18. We do not stop to inquire whether
*623 the action * of the canal commissioners, in allowing the State to use a part of the moneys collected for the benefit of the Canal Fund, was strictly in accordance with law. Suffice it so say, that the Canal Fund was entitled to any interest earned upon moneys belonging to it, and fidelity to the constitution and laws of New York required the State to recognize that right in the only way it could at the time have been done, namely, by paying the interest that ought to have been realized by the commissioners of the Canal Fund, if they had invested in interest-paying securities the moneys they permitted the State to use for military purposes. If the Canal Fund money, used by the state comptroller to defray the expenses of raising and equipping troops, had been borrowed upon the bonds of the State sold in open market, the interest paid on such bonds would, for the reasons we have stated, be a just charge against the United States on account of expenses properly incurred by the State for the purposes expressed by Congress. And such would have been the result if the moneys of the Canal Fund had been invested by the commissioners directly in bonds of the State, bearing the same rate of interest that was paid to the commissioners of that fund. The substance of the transaction was that the State, for moneys that could not be legally appropriated for the ordinary expenses of its own government, and which the law required to be so invested as to earn interest for the Canal Fund, used those moneys for military purposes, under an agreement by its officers, subsequently ratified by the State, to pay interest thereon. It was, in its essence, a loan to the State by the commissioners of the Canal Fund of money to be repaid with interest. The obligation of the United States to indemnify the State, on account of such payment, is quite as great as it would be if the transaction had occurred between the State and some corporation from which it borrowed the money. It is not the case of the State taking the money out of one pocket to supply a deficiency in another over which it had full power; for, although the moneys brought into its treasury by the collection of taxes were under its control, the State was
*624 without power to manage and control taxes collected for * the Canal Fund, except as provided in its constitution and laws. It could not legally have become a party to any arrangement or agreement involving the use, without interest, of the moneys of the Canal Fund that had been set apart for the ultimate payment of the canal debt.

We are of opinion that the claim of the State for money paid on account of interest to the commissioners of the Canal Fund, is not one against the United

States for interest as such, but is a claim for costs, charges, and expenses properly incurred and paid by the State in aid of the General Government, and is embraced by the act of Congress declaring that the States would be indemnified by the General Government for moneys so expended.

As the State was entitled to a larger sum than $91,320.84, *the judgment is reversed, and the cause is remanded with directions for further proceedings not inconsistent with this opinion.*

State of Missouri v. State of Iowa.

Supreme Court of the United States, 1896.

[160 *United States,* 688.]

At the request of the parties, this court, after deciding where is the true and proper southern boundary line of the State of Iowa, appoints a commission to find and remark the same with proper and durable monuments.

The State of Missouri, through its Attorney General, filed in this court in vacation its bill, in which, after setting forth the former proceedings had herein for the determination of the boundary line between it and the State of Iowa, which are reported in 6 How. 659, and 10 How. 1, it was further said:

"Complainant states that it is highly important to the States of Iowa and Missouri that the question of boundary should be speedily and finally settled; that heretofore the peace of the people of the States of Missouri and Iowa, especially in the county of Mercer, in the former, and the county of Decatur, in the latter, have been seriously disturbed in consequence of frequent conflicts of jurisdiction arising from differences of opinion as to the location of the said state line between said counties.

"Complainant further states that the State of Missouri has no adequate relief at law, and, as the controversy herein involves questions of jurisdiction and sovereignty, it is respectfully prayed that the State of Iowa may be made a defendant in this proceeding, and that she may be permitted to answer the matters and things herein set forth, and upon a final hearing that the northern boundary line of the State of Missouri, it being the boundary line between the complainant and defendant, be by the order and decree of this court ascertained and established; that the rights of possession, jurisdiction, and sovereignty of the State of Missouri to all the territory south of the line heretofore marked and run out by
*689 said J. C. Sullivan * in 1816, remarked by the commissioners heretofore named in 1850, and approved by the decree of the Supreme Court of the United States rendered as aforesaid, be restored to said State of Missouri, and that said State of Missouri be quieted in her title thereto, and that the defendant, The State of Iowa, be forever enjoined and restrained from disturbing the said

State of Missouri, her officers and her citizens, in the full enjoyment and possession of the territory lying south of said line, and that such other and further relief may be granted as the nature of the case may require."

The State of Iowa, by its Attorney General, filed its answer, denying some of the allegations in the bill, admitting others, making further averments on its own part, and concluding:

"Said respondent, with the view to have an ultimate and final decision of the controversy, prays that this answer may also be treated as a cross-bill, and joins in the prayer of said complainant that the said boundary line between said complainant and respondent be, by the order and decree of this court, ascertained and established, and to that end that a commission be appointed, in such manner as to this court shall be deemed proper, to retrace the line traced and marked by the commission of this court in 1850, and as set forth in the decree of this court in the case of *State of Missouri* v. *The State of Iowa,* as aforesaid, and that such retracing of such line thus found be by such commissioners marked with fixed and enduring monuments, and that the title of the State of Iowa in and to all land or territory north of the line thus found and marked be forever quieted in the said respondent, and for such other and further relief as equity and good conscience may require."

To this answer the State of Missouri filed replication as follows:

"Complainant, for its reply to respondent's answer herein, states that it is true, as heretofore alleged in complainant's petition heretofore filed in this cause, that the officers of the State of Iowa are exercising jurisdiction over territory lying south of the boundary line between the States of Missouri and Iowa.

*690 * "Complainant, for further reply to respondent's answer herein, states that it is necessary, in order that conflicts of jurisdiction should be avoided between said States, that the true boundary line, as heretofore established under a decree of this court by Hendershott and Minor, in 1850, should be reëstablished and relocated, and to this end it is asked that the court may enter a decree relocating and reëstablishing said line, and that such other and further orders may be made herein as are necessary to effect the same."

The parties further stipulated, each by its Attorney General, as follows:

"It is hereby agreed that the above entitled cause may be submitted to the court on the petition, answer, and reply of the parties hereto, and if to the court it seems proper that a commission of two civil engineers or surveyors may be appointed to retrace the line established and decreed by the Supreme Court of the United States in the case of *The State of Missouri* v. *The State of Iowa,* one of such commissioners to be appointed by the State of Missouri and one by the State of Iowa, and if the parties are unable to agree that they may appoint a third, that such commission shall proceed without unnecessary delay and retrace the line as run and located by Hendershott and Minor in 1850 between the 50th and 55th mile-posts on said line, beginning and ending the survey at such points as may be necessary to ascertain the true original line between said mile-posts, and, having found said true line, to mark the same by plain and enduring monuments and make report of their said retracing and survey of said line to this court."

Mr. R. F. Walker, Attorney General of the State of Missouri, for the complainant.

Mr. Milton Remley, Attorney General of the State of Iowa, for the respondent.

Mr. Chief Justice Fuller, on the 3d of February, 1896, announced that the Court ordered the following decree to be entered in the case.

*691 * This cause coming on to be heard on the original bill filed herein by the State of Missouri against the State of Iowa, the answer thereto by the State of Iowa, and the reply to said answer by the State of Missouri, and the pleadings and stipulations filed herein by counsel for the respective parties having been duly considered, and the decrees heretofore rendered by this court on February 13, 1849, and on January 3, 1851, with the report of commissioners forming part thereof, in a cause then pending before this court between the said States of Missouri and Iowa in regard to the same boundary line now in controversy having been examined:

It is, thereupon, this third day of February, A. D. 1896, ordered, adjudged, and decreed, that the true and proper northern boundary line of the State of Missouri and the true and proper southern boundary line of the State of Iowa is the line run, located, marked, and defined by Hendershott and Minor, commissioners of this court, under the order and decree of this court, as set forth in their report annexed to said decree of January 3, 1851. And it appearing further to the court that the proper boundary line between said States, run, located, and established by Hendershott and Minor, as aforesaid, has, between the fiftieth and fifty-fifth mile-posts on the same, become obliterated, and that the monuments originally placed thereon have been destroyed, therefore it is further ordered, adjudged, and decreed that James Harding of the State of Missouri, Peter Dey of the State of Iowa, and Dwight C. Morgan of the State of Illinois, be and they are hereby appointed commissioners to find and remark with proper and durable monuments such portions of said line so run, marked and located by Hendershott and Minor as have become obliterated, especially between the fiftieth and fifty-fifth mile-posts on the same, and that they begin and end such survey at such points along said line as will enable them to definitely relocate and redesignate the same.

It is further ordered, that the clerk of this court at once forward to the chief magistrate of each of said States and to each of the commissioners designated by this decree a copy of said decree duly authenticated, and that said com-
*692 missioners * request the coöperation and assistance of the state authorities in the performance of the duties imposed upon them by this decree, and proceed with all convenient speed to discharge their duty in relocating and remarking such portions of said line as have become obliterated, as herein directed, and make their report thereof and of their proceedings in the premises to this court on or before the first day of May, 1896, together with a complete bill of costs and charges annexed.

And it is further ordered that, should either of said commissioners die or refuse to act or be unable to perform the duties required by this decree, while the court is not in session, the Chief Justice is hereby authorized and empowered to

appoint another commissioner to supply the vacancy, and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered, that all costs of this proceeding, including not exceeding ten dollars per day for each commissioner, and the other costs incident to the marking and establishment of this line, shall be paid by the States of Missouri and Iowa equally.[1]

So ordered.

United States v. State of Texas.

Supreme Court of the United States, 1896.

[162 *United States,* 1.]

The treaty between the United States and Spain, made in 1819, and ratified in 1821, provided that "the boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of the river to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818." *Held,*

(1) That the intention of the two governments, as gathered from the words of the treaty, must control, and that the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty.

(2) But, looking at the entire instrument, it is clear that, while the parties took the Mellish map, improved to 1818, as a basis for the final settlement of the question of boundary, then contemplated, as shown by the fourth article of the treaty, that
*2 the line was subsequently * to be fixed with more precision by commissioners and surveyors representing the respective countries.

(3) That the reference in the treaty to the 100th meridian was to that meridian astronomically located, and not necessarily to the 100th meridian as located on the Melish map;

(4) That the Melish map located the 100th meridian far east of where the true 100th meridian is, when properly delineated;

(5) That the Compromise Act of September 9, 1850, and the acceptance of its provisions by Texas, together with the action of the two governments, require that, in the determination of the present question of boundary between the United States and Texas, the direction in the treaty, "following the course of the Rio Roxo westward to the degree of longitude 100 west from London," must be interpreted as referring to the true 100th meridian, and, consequently, the line "westward" must go to that meridian, and not stop at the Melish 100th meridian;

(6) That Prairie Dog Town Fork of Red River is the continuation, going from east to west, of the Red River of the treaty, and the line, going from east to west,

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[1] For the final phase of this case see *Missouri* v. *Iowa* (165 U. S. 118), *post,* p. 1246.—Editor.

extends up Red River and along the Prairie Dog Town Fork of Red River to the 100th meridian, and not up the North Fork of Red River;

(7) That the act of Congress of February 24, 1879, c. 97, creating the Northern Judicial District of Texas, is to be construed as placing Greer County in that district for judicial purposes only, and not as ceding to Texas the territory embraced by that county.

The territory east of the 100th meridian of longitude, west and south of the river now known as the North Fork of Red River, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red River and the river now known as the Prairie Dog Town Fork or South Fork of Red River until such line meets the 100th meridian of longitude—which territory is sometimes called Greer County—constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America.

Each party will pay its own costs.

By the act of May 2, 1890, c. 182, § 25, 26 Stat. 81, 92, the Attorney General of the United States was "directed to commence in the name and on behalf of the United States, and prosecute to a final determination, a proper suit in equity in the Supreme Court of the United States against the State of Texas, setting
*3 forth the title and claim of the United States * to the tract of land lying beween the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary and a part of its land, and designated on its map as Greer County."

This suit was commenced in compliance with that direction. A demurrer to the bill was heard and overruled at October Term 1891, (143 U. S. 621,) and the case was at this term heard upon its merits.

Mr. Attorney General, Mr. Solicitor General and *Mr. Edgar Allan* for the United States.

Mr. George Clark, Mr. M. M. Crane and *Mr. A. H. Garland* for the State of Texas. *Mr. Charles A. Culberson, Mr. George R. Freeman* and *Mr. H. J. May* were on the briefs for the State.

I. The map of Melish, improved to the first of January, 1818, made part of the treaty, conclusively establishes the claim of Texas to the territory in controversy, and known as Greer County.

The boundary line from the mouth of the Sabine River to the point where the line strikes the Rio Roxo of Natchitoches or Red River is not disputed, and that on the north and west of the State was settled by the act of September 9, 1850. This act of 1850 has no reference to the boundary line from the point where it intersects Red River, thence up that river to the 100th meridian and northward, or to the disputed territory. This is plain from the act itself, and it is expressly alleged in the bill. The case therefore turns upon that portion of the treaty providing, "then following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River and running thence by a line due north to the river

Arkansas," and "the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818."

*4 * Accepting the admission and argument of complainants' counsel, that unless the act of 1850 operates to settle the eastern boundary line of the State against her claim, the territory rightfully belongs to Texas, other facts make it indisputable that the act can be given no such effect. In the first place, when this act was passed, the actual intersection of the 100th meridian with Red River had not been determined, and the meridian referred to in the act necessarily and logically was that shown on the map of Melish made part of the treaty. The title of the act shows that it is confined to the northern and western boundaries. By the first section of the act Texas agreed that "her boundary *on the north*" should commence at the point of intersection of the 100th meridian with the parallel 36° 30′, and by the second section ceded to the United States "all her claim to territory *exterior*" to this line, thus clearly and undoubtedly ceding only territory *north* of this line. This is also shown by the controversy which led to the passage of this act; for it is well known that it had no reference to the eastern boundary line of the State. At that time the United States had not asserted any claim to Greer County, and did not do so till years afterwards. The eastern boundary line of the State is regarded by the United States as that laid down by Melish on his map of 1818; the act of 1850 has been so construed by Congress. By the act of the legislature of Texas of May 2, 1882, the United States were invited to appoint commissioners to mark the line thus defined, and the Congress accepted said invitation by the act of January 31, 1885, reciting the terms of the treaty of 1819, and directing the commissioners to "mark the point where the 100th meridian of longitude crosses Red River *in accordance with the terms of the treaty aforesaid.*" In view of these solemn declarations by Congress, together with the pleadings and other considerations mentioned, it is manifest that the 100th meridian of longitude named in the act of 1850 is that laid down by Melish.

But if the intersection of the 100th meridian of longitude with the parallel 36° 30′ north latitude, constituting the beginning of the north boundary line

*5 of Texas under the act of 1850, * shall be held to mean the actual, and not the Melish intersection, it does not follow that the actual, and not the Melish 100th meridian constitutes the eastern boundary line of the State. Before this court can reach the conclusion contended for by complainants, it must set at naught the pleadings in the cause, the repeated declarations of the sovereign power of the United States, and the obvious meaning of the act of purchase. Nor is the situation altered by the fact that this construction will leave for future determination the ownership of a portion of the northeastern territory. That has occurred before. *Cook* v. *United States,* 138 U. S. 157. It should not be used as a pretext to disturb the integrity of our territory. The small consideration of ten millions of dollars, paid under the act of 1850, in itself refutes such a contention; and the United States, now grown imperial in every national aspect, should limit rather than enlarge the terms of contracts with members of the Union.

Counsel for the United States does not appear to contest the proposition that the map of Melish constitutes part of the treaty, and that its representation of degrees of latitude and longitude is controlling unless affected by the act of 1850. The rule is thoroughly settled. *McIver* v. *Walker,* 9 Cranch, 173; *McIver* v. *Walker,* 4 Wheat. 444; *Noonan* v. *Lee,* 2 Black, 499; *Davis* v. *Rainesford,* 17 Mass. 207; *Jenkins* v. *Trager,* 40 Fed. Rep. 726; *Koenigham* v. *Miles,* 67 Texas, 113; *Cragin v. Powell,* 128 U. S. 691; *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178.

If there were otherwise doubt of the matter, the fact that the treaty ex-

pressly provides for determining the *actual* source of the Arkansas River, regardless of the map, establishes beyond question that the purpose was to leave all else to the delineation of the map. While this rule is practically admitted, it seems to be insisted by counsel that the Melish delineation of upper Red River is inaccurate, that the North and South Forks of that river, as now known, are not represented upon that map, and that the United States had no other knowledge of the country other than that afforded by the Melish map. Recalling the admis-
*6 sion heretofore referred * to, that according to that map Greer County is in Texas, it is not material, if true, that the forks are not represented, or that the map is not accurate, or that the United States were without other information, and a decree should be entered for the defendant regardless of these matters. For reasons to be stated, it is certain, however, that both of the forks of the river are laid down on the Melish map of 1818, that their existence was fully known to the United States and Spain at the date of the treaty, and that the map is surprisingly accurate.

Before discussing these propositions, however, we call attention to the strong testimony to the effect that the South Fork, or Prairie Dog Town River, is not laid down on the Melish map, that the treaty was entered into without reference to it, and consequently the North Fork is the river of the treaty. Especially we invite attention to the testimony in the record of Mr. Charles W. Pressler, at present and for 38 years engaged as chief and assistant draughtsman in the General Land Office of Texas, and the most experienced and competent map maker in the State.

The testimony demonstrates that the North and South Forks of Red River are laid down on the Melish map of 1818 and made part of the treaty, the confluence being just west of the 101st meridian of longitude, between the 33d and 34th parallels of latitude. By the scale of this map the confluence is about 70 miles west of the intersection of the 100th meridian with Red River, and therefore the territory in controversy belongs to Texas. The propositions which we now purpose establishing are that the parties to the treaty were well informed of the geographical features of the country in the vicinity of the forks of Red River; in reference to these features they agreed upon the 100th meridian of west longitude, as laid down on the map of Melish, as the boundary line from Red River to the Arkansas, whether astronomically correct or not; that said boundary line was thus fixed by the map and with reference to the great natural landmarks shown on the face of the map; that its position so fixed is far east of the forks of Red
*7 River and of Greer County, and of the line now claimed by * complainants to be the true 100th meridian; and that the map of Melish delineates the North and South Forks of Red River and is substantially accurate. The position assumed by complainants, that the section of country in dispute was unknown to them and to the Spaniards, is thoroughly disproved by the record. It will be shown that it was known to the Spanish government and the United States in this order. The negotiations between the parties leading up to the treaty show that the territory which had been under discussion at the time of the treaty, was bounded on the south by a line along Red River, from the vicinity of Natchitoches to its head, and thence west to the Pacific Ocean, and on the north by a line from the mouth of the Missouri River westward to the Pacific Ocean, along the courses of the Missouri and Columbia rivers; but that towards the close of the discussion, it was narrowed principally to the region between the Red River, west of Natchitoches and the Arkansas.

The question of boundary had existed from the acquisition of Louisiana by the United States in 1803, and both parties to the treaty had, for many years, been informing themselves of this extensive region and its geographical outline.

The record shows that it was known to the Spaniards as early as 1541, when Coronado made a military expedition from the mouth of the Puerco or Pecos River, reaching the region of the Arkansas, Kansas and Platte Rivers, occupied by the Quivera Indians, subsequently, in 1778, called the Pawnees or Pananas by the Spaniards.

It was visited and occupied by them continually from that time until the date of the treaty, from Santa Fé as a base of operations, as shown by the record.

[Counsel then referred in detail to Spanish expeditions in 1601, 1611, 1629, 1632, 1650, 1654, 1698; and to French expeditions in 1698, 1719, 1722, 1724, 1727, 1729 and 1759.]

But there still remains to be mentioned perhaps the most conclusive evidence of the familiar knowledge the Spanish government had of the region under discussion.

On the face of the country, from the northeastern borders of Texas
*8 along the Red River to the head of the North Fork * of Red River, there are still to be seen traces of Spanish civilization and enterprise, which shows the occupancy of all that river, including the North Fork to its source, by the Spaniards, from ancient times to dates within the memory of men now living, while no similar or other signs of such occupancy by them have been discovered on the South Fork of that river.

About the year 1791 the Spanish government laid out two roads eastward from Santa Fé; one to a point in the Province of Louisiana known as the Establishment of San Louis of the Illinois, which was an eastern tributary of the Arkansas River, debouching into it nearly opposite the mouth of the Canadian, a western tributary of the same river; and the other to Natchitoches on Red River, in the Province of Louisiana.

These roads were by way of the North Fork of Red River, and the Kiowa and Panis villages on that stream; the former about 75 miles and the latter about 35 miles above its junction with the Prairie Dog Town River, or South Fork of Red River, and passing down the North Fork, in places for some miles having two tracks, by reason of cut-offs, reached the junction of the North and South Forks of Red River on the east side of the North Fork, and there separated, one going toward the Illinois River, which lies a short distance west of Fort Smith, Arkansas, and the other crossing the river below said junction to the south side, and passing down that side of the river towards Natchitoches, dividing into several tracks in places, by reason of cut-offs; and the stream down which these roads passed was the stream known as the Rio Roxo de Natchitoches, the boundary line of the treaty of 1819, south and west of which is the territory of Greer County.

That the two roads were laid out from Santa Fé, the capital of the province of New Mexico, to the points mentioned above, is shown by the public archives of the territory of New Mexico.

The points to which they were laid out, the Illinois River and Natchitoches, are both delineated on Pike's map accompanying his published account of his expedition up the Arkansas River, put in evidence by complainants. That of the Illinois, as shown by several modern maps in the record, appears to be
*9 * a little over one half of a degree west of Fort Smith, Arkansas; while that of Natchitoches appears to be on the Red River, in the State of Louisiana. Mésières describes these two localities as being about the same distance from the Taovayase villages as San Antonio and Santa Fé.

The following facts in the record show that these roads were laid out and became well travelled roads, to and from the North Fork of Red River.

There remains an old, well worn and beaten road, long since fallen into

disuse, but still visible and well marked on the face of the ground, from the northeast corner of Texas up the south side of Red River, by way of an old Spanish fort in Montague County on Red River, to a neighborhood above the mouth of the Wichita River, and thence across the Red River northward to the forks of the river, on the east side of the North Fork of Red River; thence up the same to the site of the old Panis villages, and to the site above occupied by the Kiowa Indians in 1833, about 75 miles above the forks of Red River; and thence by way of the head of the False Wichita River toward Santa Fé, in places dividing into two roads where there are bends in the river, which road, as far back as the memory of very old men reaches, has been known and reputed, in the neighborhood through which it passes, as the old Santa Fé road from Natchitoches; and as late as 1819 was frequented by Mexican traders coming from Santa Fé, and as late as 1838 or 1839 was used by a party of Chihuahua traders coming from Santa Fé; while as late as 1833 there existed an old, well worn, but disused, wagon road from the forks of Red River eastward to the region of the Illinois River, near Fort Smith, Arkansas, which was travelled by a large party of men from Fort Smith to the forks of Red River in 1833, where it intersected the other old road from Natchitoches to Santa Fé.

The ruins of a number of old Spanish villages and fortifications still exist along the route of the old Natchitoches and Santa Fé road, on the North Fork of Red River, and on this river below its junction with the Prairie Dog Town
*10 River, which conclusively demonstrates our proposition of familiar * knowledge with the North Fork, and shows the reason for the old road, and why the North Fork was deemed and named the Red River of Natchitoches, while the absence of any such evidence of occupancy and familiar knowledge of the Prairie Dog Town River country equally demonstrates the improbability that it was ever deemed the Rio Roxo of Natchitoches prior to the treaty of 1819.

In 1762, by the treaty of Fountainebleau, the territory of Louisiana was transferred by France to Spain. That this region was, at the time of that treaty, well known to the Spaniards counsel claimed was shown by an abundance of evidence in the record, which they referred to in detail.

The same region was well known to the government of the United States, at the date of the treaty, especially along its northern border, and along the Arkansas River, and at the point of intersection of that river by the 100th meridian, as laid down on Melish's map.

In 1803, the United States having arranged for the acquisition of Louisiana, both Upper and Lower, sent out Messrs. Lewis and Clark to explore the country between the mouth of the Missouri and the Pacific Ocean. These men performed this task with such wonderful fidelity, that their fame has to this day reached the ear of every schoolboy in the land; and their reports show that at that time the whole region between the Arkansas and Missouri rivers was occupied by American, English, and French traders.

They were particularly instructed by President Jefferson in these words, to wit: "Although your route will be along the Missouri, yet you will endeavor to inform yourselves by inquiry of the character and extent of the country watered by its branches, and especially on its south side. The North River, or Rio Bravo, which runs into the Gulf of Mexico, and the North River, or Colorado, which runs into the Gulf of California, are understood to be the principal streams heading opposite the headwaters of the Missouri, and running southwardly. Whether the dividing grounds between the Missouri and them are mountainous or flat lands, what are their distances from the Missouri, the character of
*11 the intermediate * country, and the people inhabiting it, are worthy of particular attention."

They met and had dealings and intercourse with divers traders from St. Louis, who traded up the Osage, Platte, and Kansas Rivers, and reported minutely the character of the country and its population, even extending to the Pawnees on Red River.

The statistical table prepared by them, to which the attention of the United States Congress was called by President Jefferson in his special message, in 1808, shows a minute knowledge of the localities occupied by the Indians from the mouth of the Canadian to the head of the Arkansas, Platte, and Kansas Rivers, as well as minute statistics of their numbers, character, habits, associations, commerce, the people with whom they traded or were at war, and their condition generally. Counsel also called attention to Zebulon Pike's expedition in 1806; to Sibley's account in the same year, and to the two maps published with the account of Pike's expedition in 1810, concerning which they said: On their face it conspicuously appears that United States, by Officers Wilkerson and Pike, had made careful and precise reconnoissance of all the region along the Arkansas River, from its mouth to its source, and especially about the apex of the great bend of the Arkansas, at which Wilkerson and Pike had camped and separated, one to explore the river to its mouth, and the other to explore it to its source; and at which the boundary line of the treaty, the 100th meridian of Melish's map, intersected the river.

It is clear, therefore, that the United States government, before the date of the treaty, had at command abundant means of knowledge of the whole country from the junction of the Verdigris, Canadian and Illinois Rivers with the Arkansas, described by Lieutenant Wilkerson, to the head of the latter, and from the mouth of Red River to the home of the Panis on the North Fork of the Red River, which was utilized till the date of the treaty.

In 1818 John Melish published in the city of Philadelphia the map which was made the map of the treaty of 1819. Looking at it, and along the 100th
*12 meridian of west longitude, * between the Red River and the Arkansas River, we are struck with the aptness of the language of the treaty that it was intended to designate with precision the limits of the respective bordering territories; for on both sides of that line we see delineated great natural landmarks which, if they exist on the ground, must necessarily fix and determine its locality with remarkable precision.

The parties to the treaty were both definitely notified by this map that the Red River forked west of that line, at a point nearly due south, but a little east of south, and about 207 miles by the scale of the map from the apex of the Great South Bend of the Arkansas River, and south of a mountainous region that extended along the North Fork on its north side toward the northwest, and then northward to the Arkansas River; and that to the northeast of that South Bend of the Arkansas River, and in close proximity to the 100th meridian limit, lay the apex of a Great North Bend of the same river; while close by, but on the opposite side of that meridian, was the notable point where Pike had commenced his explorations of that river, under the auspices of the United States government, in 1806, and that from the apex of that North Bend the river took its course in a long stretch to the southeast, till it reached the neighborhood of several contiguous and peculiarly shaped bends, about the mouth of Jefferson River, in a region northeast from the forks of Red River, and southeast from the South Bend of the Arkansas. And especially were they notified by this map that both of the forks or branches of Red River, and all of their headwaters, lay west of that line agreed upon as a boundary from the Red River to the Arkansas.

It is obvious from the record, that these several great natural features and outlines exist on the ground in the corresponding relative position to each other and to Melish's 100th Meridian delineated on this map, and that the information by which these striking correlations were delineated must have been remarkably

accurate for that day and time; and that the allegation of plaintiff, that in fact Melish had no knowledge of the existence of said forks of Red River, is untrue and reckless.

*13 * The forks of Red River are found in the relative position delineated. The record shows that those forks have been found by careful astronomical observation to be about 227 miles south and 36 miles east of the apex of the Great South Bend of the Arkansas. It shows that the mountainous country north of the forks and north of the North Fork, and extending northward towards the Arkansas River, exists on the ground. It shows that the apex of a Great North Bend of that river, to the northeast of the apex of the South Bend, exists on the ground, in close proximity to the point where Pike commenced his exploration of the river in 1806. It shows that the long stretch of the Arkansas River southeast from the apex of the Great North Bend to the several contiguous and peculiar bends of the river about the mouth of the Salt Fork of modern maps, which is the Jefferson's River of Melish's map, exist on the ground. It shows that these peculiar bends of the river lie southeast from the apex of its Great South Bend, and northeast of the forks of Red River. It shows that these several great landmarks, as they exist on the ground, lie approximately in the same relative position to the line delineated by Melish for the 100th meridian of west longitude, as they are represented to be on the map, and especially that the forks of Red River are west of that line; and all of the headwaters of both the North and South Forks, and also the mountains along the North Fork, lie west of that line, as they exist on the ground. And the conclusion is inevitable that the boundary line of the treaty, from Red River to the Arkansas along the meridian of the 100th degree west longitude, as laid down on Melish's map, lies east of the forks of Red River, and intersects the Arkansas River in the immediate vicinity and west of the apex of the Great North Bend of that stream, and also intersects the Red River at a point far below and east of the forks of that river, and lies far to the eastward of Greer County, and that this fact must have been fully understood and acted upon by both parties to the treaty since they made the 100th meridian, as laid down on this map, the boundary.

*14 The parties to the treaty were well advised of the difficulty * and uncertainty of determining with precision and accuracy the position of meridian lines at that day and time. They were fully informed that Pike, with the use of the astronomical instruments and appliances with which he was provided, had laid down the 100th meridian of west longitude in reference to the Great North Bend of the Arkansas, about two degrees farther east than Melish had done, with the assistance of the recent surveys of Bringier.

The telegraph was then unknown, and the methods then in use of ascertaining the differences in time between Greenwich or Washington and the locality of the observer had proved too crude to be relied upon to fix with precision a boundary line; of which fact the parties to the treaty had a demonstration in the two maps just mentioned.

Hence the necessity of agreeing upon a diagram laying down the line of boundary in reference to great and stable natural landmarks upon a map, which should point out the unchanging and unchangeable localities had in view, to fix the position of the line.

Had the treaty been in 1806, and the absolute 100th meridian been made the boundary, and Pike been called on to mark it on the ground, he would have located it nearly two degrees east of the apex of the Great North Bend of the Arkansas River. (See his map.) But if the parties had surveyed the ground and made observations twelve years later with Bringier, whose data were adopted by Melish, the line would have appeared to be two degrees farther west, where Melish laid it down; and had the survey been postponed till forty years more had elapsed, Jones and Brown would have made the line appear more than

fifty miles still farther to the westward, and west of the apex of the Great South Bend of the Arkansas River, and at least three degrees farther west than its determination by Pike in the year 1806.

To suppose the treaty-makers intended a line whose position might be shifted with every improvement in methods and instruments used in making astronomical observations, when expressly declaring that it should be as laid down on the
*15 map of the treaty, in the midst of great and unmistakable natural * land marks, is too unreasonable for discussion. It is worthy of remark, that after the treaty of boundary, Melish furnished his map to the historian Bonnycastle, and the latter published it in his New Spain as Melish's map in 1819, and that on its face the line of demarcation between the territories of Spain and the United States, indicated by a dotted line, is laid down as intersecting the Arkansas River at the Great Bend of that river (see Bonnycastle's New Spain); and that George Catlin's map of Indian Localities in 1833 still laid down the same boundary as intersecting that river at the same bend, where Melish laid down the 100th meridian, and corresponds to the line established as the boundary by Exhibit B. of C. Corner and his testimony.

II. If the treaty and map of Melish be disregarded, considered scientifically and historically, the North Fork is the main Red River, and consequently the territory is rightfully part of Texas.

Scientifically the North Fork is the main river, because it is the permanent and longest stream, discharges annually the greater volume of water, and imposes its course upon the river at and below the confluence; and historically it is the main river, because it was first discovered and was named and known as Red River, while the South Fork was named Prairie Dog Town River.

Without regard to the comparative length and breadth of their beds, however, the North Fork is shown to be the principal river in reference to the most important attributes of a river, to wit, the quantity of water which it furnishes, and its permanency as a flowing stream, and for that reason it was and is the stream properly considered the Red River of Natchitoches; and if the 100th meridian of west longitude, as laid down on Melish's map, and designated in the treaty of boundary as the boundary line, lies as far west as the forks of Red River, then the North Fork should be deemed the boundary line, and the territory to the south of it, including Greer County, should be held to be Texas territory.

After examining in detail a mass of testimony, which, they contended,
*16 established these propositions, counsel said: If it * be conceded, against the overwhelming testimony in the case, that the South Fork discharges the greater volume of water, the North Fork is yet the river of the treaty and the main Rio Roxo of the Natchitoches, because of its first discovery and historical designation as such, upon which there is no conflict in the testimony. It is well known that the Missouri is the real continuation of the Mississippi River, but it is no more competent to reverse history there, upon principles of justice and national honor, than to disrupt conditions which have existed on Red River for three quarters of a century.

III. Since its independence, Texas has likewise asserted its ownership of said territory, and has persisted in such assertion down to the present day by acts of government, of legislation and of occupancy. No governmental act of the State can be tortured or perverted into acquiescence on its part in the claim of the United States. To the contrary the government of the United States has recognized the right of Texas to the territory in dispute by solemn acts of government, and is now estopped to claim the same or any part thereof.

One of the earliest acts of the Republic of Texas was the assertion of its

boundary rights under the treaty of 1819 by virtue of an act of Congress of the Republic of Texas approved December 19, 1836, the first section of which read as as follows:

Section 1. "That the civil and political jurisdiction of this Republic be and is hereby declared to extend to the following boundaries, to wit: Beginning at the mouth of the Sabine River and running west along the gulf of Mexico three leagues from land to the mouth of the Rio Grande; thence up the principal stream of said river to its sources; thence due north to the 42d degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning." 1 Paschal's Dig. of Laws, Art. 438.

After its admission as a State, by joint resolution adopted April 29, 1846, Texas asserted its exclusive right to its soil and boundaries in the following words:

Section 1. "That the exclusive right to the jurisdiction over the soil in-
*17 cluded in the limits of the late Republic of * Texas was acquired by the valor of the people thereof, and was by them vested in the government of the said Republic; that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States by the Constitution of the United States and by the general resolution of annexation subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes resident within the limits of the State to any portion of the soil thereof, and that we recognize no right in the government of the United States to make any treaty of limits with the said Indian tribes without the consent of the government of this State." 1 Paschal's Dig. of Laws, Art. 441.

It continued to assert its jurisdiction over the territory in dispute by legislation beginning in 1839, and extending through all the intervening years.

In addition to this, Texas has donated Greer County, outside of the limits of Greer County, 17,712 acres (four leagues) for county school purposes. It has erected sixty public school buildings in the county. In 1892 there were 2250 enrolled scholars in the public schools. In 1892, by the last school apportionment, Texas was distributing annually $11,844 of taxes collected from the people of Texas, among the inhabitants of Greer County for the purpose of public education on the basis of $5.26⅔ per pupil. It had established sixty-six district schools besides school communities, and sometimes they organized two or more institutions in a community for school purposes. Every school district had a school except two, in which they had exhausted their school money in erecting school buildings.

These facts briefly cited from the record, (and there is a vast accumulation of other evidence therein; but to which the attention of the court is directed,) manifest most clearly that Texas has been in the actual possession of the particular territory claimed by the United States in this suit, for a period of more than fifty years, claiming expressly under the treaty of 1819, as Mexico, its predecessor, had claimed before, and as had been claimed by Spain prior to the
*18 independence of * Mexico, from the date of the treaty until the termination of her dominion.

The record further abundantly attests, some of the evidence as to which has been cited already by us, that the United States by solemn acts of Congress had recognized this possession of Texas and had ripened it into a confirmed right, long anterior to the commencement of these proceedings.

In *Philips* v. *Payne*, 92 U. S. 130, where an effort was made to avoid payment of taxes because of the alleged unlawful retrocession of Alexandria to Virginia, the court held that the party was estopped from questioning that.

Greer County is fixed, and has been since its organization in 1860, in a senatorial district and in a legislative district, one of the legislative districts of Texas, and has been constantly represented. It has been, and is, in a judicial district of the United States by act of Congress. It has been, and is, in a Congressional district. All that time it has had its position in a state judicial district. Not till about seven years ago did the Post Office Department cease to fix post offices in Greer county, Texas, which it had done regularly before then. At that time it, for some reason, changed the description, but it was too late for any purpose touching the rights of Texas to this property.

All this and much more that could be added, if need be, show that Greer County, Texas, has been recognized by people, private and public officials, both state and national, and by both state and national authorities, legislative, executive and judicial. Not more firmly fixed in their respective statehoods is Cook County in Illinois, or Bourbon County in Kentucky, or Bucks County in Pennsylvania.

Nations are prescribed and estopped as individuals, so are we told in *Phillips* v. *Payne, sup.* In this discussion we stand alone upon acts open and undisguised, and say nothing upon propositions to settle or to compromise, after it was thought by some that the line should be away below where it is, as all such efforts are for peace and quiet, and the law commands them and does not draw any admission from them.

*19 * The facts disclose two real acts of estoppel against the United States, substantial in their character.

(1.) The reimbursement of Texas for the disarmament of Snively's command was recommended by the President to Congress, and Congress in pursuance of such recommendation, promptly provided compensation. If Snively's command was not upon United States territory at the time of its disarmament by Captain Cooke, the Texans were there wrongfully and ought to have been disarmed, and their arms confiscated. There could be no claim for indemnity on the part of Texas for a wrongful act such as this. If it invaded the territory of a neighboring republic in 1843 its troops should have been captured and their arms and supplies should have been confiscated; because for all intents and purposes they were acting as public enemies and by the law of nations were entitled to no grace. Yet, as is admitted, in 1847, the government of the United States made public reparation for the wrong done, practically confessing the wrong, and in effect declaring by the legislation, that the Texas troops were rightfully upon Texas territory at the time they were captured and their arms seized by Captain Cooke. This territory comprises the territory of Greer County, now in dispute, and it is too late now for the government to contend for a different finding.

(2.) A governmental act of more potent significance is in the legislation by Congress of 1879 creating the Northern Judicial District of Texas. The force and effect of this legislation is attempted to be parried by complainant in this cause by the insertion of long extracts from the reports of House Committees and statements by Chairmen of House Committees that this legislation was inadvertent and had and done in ignorance by the members of the Congress and Senators as to the true status of the territory embraced within such legislation. The counsel for the government seems to misapprehend or to defiantly disregard the force and potency of his own suggestion. Notwithstanding these reports of committees and *ex cathedra* utterances of chairmen of committees, this statute of Congress so disposing of Greer County, Texas, as a part of the territory of

*20 Texas, has been upon the statute * book for fifteen years unrepealed, unqualified, and unaffected. Can this court, disregard such legislation? Can this court, with all its powers, afford to say, and especially upon the faint intima-

tions of the record, that Congress did wrong, either from ignorance or any other motive? Not so. The record is made up, and this court and every State in the Union and every citizen of every State, and the United States itself, must abide by the record as made. Greer County is a part of Texas, so conceded by the government of the United States, which stands in law estopped by such governmental act.

IV. Should the court determine all questions submitted against the State of Texas, including that of estoppel, there certainly can be no doubt of the right of defendant to insist that the intersection of the 100th meridian with the river be accurately fixed. This has been done by Professor H. S. Pritchett against whose conclusion not a syllable of testimony has been adduced, and the line should be established as found by him, 3797.3 feet east of the initial monument placed by Messrs. Jones and Brown in 1858.

Mr. Justice Harlan delivered the opinion of the court.

By the act of Congress of May 2, 1890, c. 182, establishing a temporary government for the Territory of Oklahoma, and enlarging the jurisdiction of the United States court in the Indian Territory, it was declared that that act should not apply to "Greer County" until the title to the same had been adjudicated and determined to be in the United States. And that there might be a speedy judicial determination of that question the Attorney General of the United States was directed to institute in this court a suit in equity against the State of Texas, setting forth the title and claim of the United States "to the tract of land lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude,

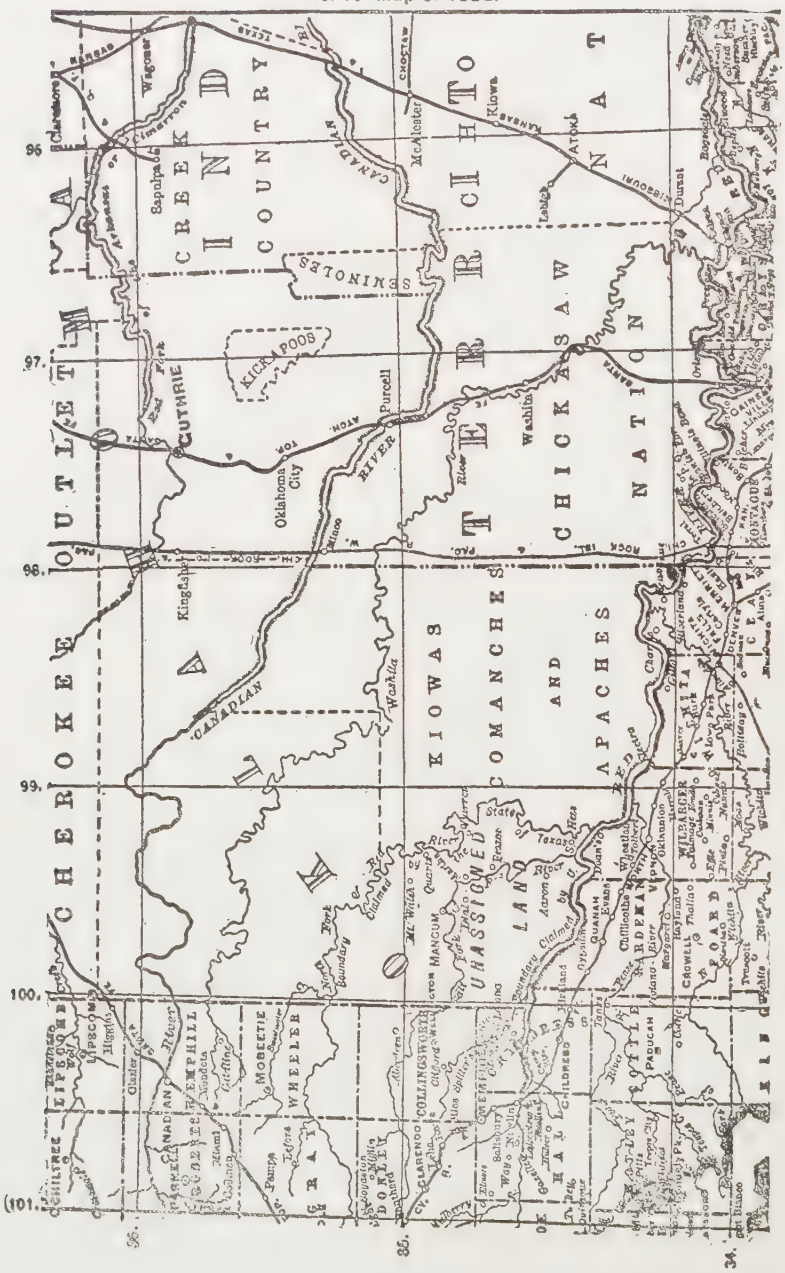
*21 and claimed by the State of Texas as within its boundary and a part of its land, and designated on * its map as Greer County;" the court, on the trial of the case, in its discretion, and so far as the ends of justice would warrant, to consider any evidence taken and received by the Joint Boundary Commission under the act of Congress, approved January 31, 1885. 26 Stat. 81, 92 § 25.

In order that the precise locality of this land may be indicated, and for convenience, we insert on page 22 an extract from a map of Texas and of the Indian Territory, published in 1892. The territory in dispute is marked on that map with the words "Unassigned Land." It contains about 1,511,576.17 acres, lies east of the 100th meridian of longitude and west and south of the river marked on that map as the North Fork of Red River and with the words "Boundary claimed by the State of Texas." It is north of the line marked on that map with the words "Boundary claimed by U. S." The river on the south side is now commonly known as Prairie Dog Town Fork of Red River, (the Indian name of which is Kecheahquehono,) which has its source in the western part of Texas, and is the same river as the South Fork of Red River mentioned in the act of 1890.

The present suit was instituted pursuant to that act. The State appeared, and demurred to the bill upon the following grounds: 1. The question of boundary raised by the suit was political in its character, and not susceptible of judicial determination by this court in the exercise of any jurisdiction conferred by the Constitution and laws of the United States. 2. Under the Constitution it was not competent for the United States to sue, in its own courts, one of the States composing the Union. 3. This court, sitting as a court of equity, could

22

No. 1. Map of 1892.



not hear and determine the present controversy—the right asserted by the United States being in its nature legal and not equitable.

Upon full consideration these several grounds of demurrer were overruled. *United States* v. *Texas,* 143 U. S. 621. The reasons given for that conclusion need not be here repeated.

The State answered the bill, controverting the claim of the United States and asserting that the lands within the boundary mentioned in the above act
*23 constitute a part of its territory. * The United States filed a replication, and proofs having been taken, the case is now before the court upon its merits.

Both parties assert title under certain articles of the treaty between the United States and Spain, made February 22, 1819, and ratified February 19, 1821. 8 Stat. 252, 254, 256.

Before examining those articles, it will be useful to refer to the diplomatic correspondence that preceded the making of the treaty. That correspondence commenced during the administration of President Madison, and was concluded under that of President Monroe. It appears that the negotiations upon the subject of the boundaries between the respective possessions of the two countries was more than once suspended because certain demands on the part of Spain were regarded by the United States as wholly inadmissible. 4 American State Papers, Foreign Relations, pp. 425, 430, 438, 439, 452, 464, 465, 466, 478. Finally, on the 24th day of October, 1818, the Spanish minister, "to avoid all cause of dispute in future," proposed to Mr. Adams, Secretary of State, that the limits of the possessions of the two governments west of the Mississippi should be designated by a line beginning "on the Gulf of Mexico, between the rivers Mermento and Calcasia, following the Arroyo Hondo, between the Adaes and Natchitoches, crossing the Rio or Red River at the thirty-second degree of latitude, and ninety-third of longitude from London, according to Melish's map, and thence running directly north, crossing the Arkansas, the White and the Osage Rivers, till it strikes the Missouri, and then following the middle of that river to its source, so that the territory on the right bank of the said river will belong to Spain, and that on the left bank to the United States. The navigation, as well of the Missouri as of the Mississippi and Mermento, shall remain free to the subjects of both parties." He also proposed that, in order "to fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations," each of the contracting parties should appoint a commissioner and surveyor, who should run and mark the line, and make out plans and
*24 keep journals of * their proceedings, the result agreed upon by them to be considered part of the treaty, and have the same effect as if inserted in it. Annals of Congress, 15th Cong. 2d Sess. 1819, 1890, 1900.

To this proposition Mr. Adams, under date of October 31, 1818, replied: "Instead of it, I am authorized to propose to you the following, and to assure you that it is to be considered as the final offer on the part of the United States: Beginning at the mouth of the river Sabine, on the Gulf of Mexico, following the course of said river to the thirty-second degree of latitude; the eastern bank and all the islands in the said river to belong to the United States, and the western bank to Spain; thence, due north, to the northernmost part of the thirty-third degree of north latitude, and until it strikes the Rio Roxo, or Red River; thence, following the course of the said river, *to its source, touching the chain*

of the Snow Mountains in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts, as marked on Melish's map; thence to the summit of the said mountains, and following the chain of the same to the forty-first parallel of latitude; thence, following the said parallel of latitude, 41°, to the South Sea. The northern bank of the said Red River, and all the islands therein, to belong to the United States, and the southern bank of the same to Spain." "It is believed," Mr. Adams said, "that this line will render the appointment of commissioners for fixing it more precisely unnecessary, unless it be for the purpose of ascertaining the spot where the river Sabine falls upon latitude 32° north, and the line thence due north to the Red River, and the point of latitude 41° north on the ridge of the Snow Mountains." Annals of Congress, 15th Cong. 2d Sess. 1903, 1904.

This proposition was rejected by the Spanish minister, and in his letter of November 16, 1818, he said: "I will undertake to admit the river Sabine instead of the Mermento as the boundary between the two powers, from the Gulf of Mexico, on condition that the same line proposed by you shall run due north from the point where it crosses the river Roxo (Red River) until it strikes
*25 the Mississippi, and thence along * the middle of the latter to its source, leaving to Spain the territory lying to the right, and to the United States the territory lying to the left of the same." To this Mr. Adams replied under date of November 30, 1818: "As you have now declared that you are not authorized to agree, either to the course of the Red River (Rio Roxo) for the boundary, or to the forty-first parallel of latitude, from the Snow Mountains to the Pacific Ocean, the President deems it useless to pursue any further the attempt at an adjustment of this object by the present negotiation. I am therefore directed to state to you that the offer of a line for the western boundary, made to you in my last letter, is no longer obligatory upon this government. Reserving, then, all the rights of the United States to the ancient western boundary of the colony of Louisiana by the course of the Rio Bravo del Norte, I am," etc. Annals of Congress, 15th Cong. 2d Sess. 1908, 1942.

The negotiations were resumed in the succeeding year and the Spanish minister wrote to Mr. Adams, under date of February 1, 1819: "Having thus declared to you my readiness to meet the views of the United States in the essential point of their demand, I have to state to you that His Majesty is unable to agree to the admission of the Red River *to its source,* as proposed by you. *This river rises within a few leagues of Sante Fé,* the capital of New Mexico, and as I flatter myself the United States have no hostile intentions towards Spain, at the moment we are using all our efforts to strengthen the existing friendship between the two nations, it must be indifferent to them to accept the Arkansas instead of the Red River as the boundary. This opinion is strengthened by the well known fact, that the intermediate space between these two rivers is so much impregnated with nitre as scarcely to be susceptible of improvement. In consideration of these obvious reasons, I propose to you, that, drawing the boundary line from the Gulf of Mexico, by the river Sabine, as laid down by you, it shall follow the course of that river to its source; thence, by the ninety-fourth degree of longitude, to the Red River of Natchitoches, and along the same to the ninety-fifth degree, and crossing it at that point, to run by a line due north to the
*26 Arkansas, * and along it to its source; thence, by a line due west till it strikes

the source of the river San Clemente, or Multnomah, in latitude 41°, and along that river to the Pacific Ocean; the whole agreeably to Melish's map." Annals of Congress, 15th Cong. 2d Sess. 2111, 2112.

The last proposition made by Mr. Adams to the Spanish minister contained the following: "Art. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine in the sea; continuing north, along the western bank of that river, to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; thence following the course of the Rio Roxo westward, to the degree of longitude one hundred and two degrees west from London and twenty-five degrees from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence following the course of the southern bank of the Arkansas, to its source in latitude forty-one degrees north; and thence, by the parallel of latitude, to the South Sea; the whole being as laid down in Melish's map of the United States, published in Philadelphia, improved to the 1st of January, 1818. But, if the source of the Arkansas River should be found to fall north or south of latitude forty-one degrees, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude forty-one degrees, and thence along the said parallel to the South Sea; the Sabine and the said Red and Arkansas Rivers, and all the islands in the same, throughout the course thus described, to belong to the United States, and the western bank of the Sabine, and the southern banks of the said Red and Arkansas Rivers throughout the line thus described to belong to Spain. And the United States hereby cede to His Catholic Majesty all their rights, claims and pretensions to the territories lying west and south of the above described line; and His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of said line, and, for himself, his heirs and
*27 successors, renounces * all claims to said territories forever." The Spanish minister required that "the boundary between the two countries shall be the middle of the rivers, and that the navigation of the said rivers shall be common to both countries." Mr. Adams replied that the United States had always intended that "the property of the river should belong to them," and he insisted on that point "as an essential condition, as the means of avoiding all collision, and as a principle adopted henceforth by the United States in its treaties with its neighbors." He agreed, however, "that the navigation of the said rivers to the sea shall be common to both people." The Spanish minister assented "to the 100th degree of longitude and to remove all difficulties, to admit the 42d instead of the 43d degree of latitude from the Arkansas to the Pacific Ocean." Annals of Congress, Appendix, 15th Cong. 2d Sess. 2120, 2121, 2123.

We have alluded to this diplomatic correspondence to show the circumstances under which the treaty of 1819 was made, and to bring out distinctly two facts that are of some importance in the present discussion: 1. That the negotiators had access to the map of Melish, improved to 1818 and published at Philadelphia. 2. That the river referred to in the correspondence as Red River was believed by the negotiators to have its source near Santa Fé and the Snow Mountains.

This brings us to the treaty itself. Its third and fourth articles are in these words:

"Art. 3. The boundary line between the two countries, west of the Mississippi,

shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or *Red River; then following the course of the Rio Roxo, westward, to the degree of longitude* 100 *west from London and* 23 *from Washington;* then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence by that parallel of latitude, to the South Sea. The whole being as laid down in
*28 Melish's * map of the United States, published at Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas River shall be found to fall north or south of latitude 42°, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine, and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say: the United States hereby cede to His Catholic Majesty, and renounce forever all their rights, claims and pretensions to the territories lying west and south of the above-described line; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever.

"ART. 4. To fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a Commissioner and a Surveyor, who shall meet before the termination of one year, from the date of the ratification of this treaty, at Natchitoches, on the Red River, and proceed to run and mark the said line, from the mouth of the Sabine to the Red River, and from the Red River to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42, to the South Sea: they shall make out plans, and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein.
*29 The two governments will amicably agree * respecting the necessary articles to be furnished to those persons, and also as to their respective escorts, should such be deemed necessary." 8 Stat. 252, 254, 256.

So much of the Melish map of 1818 as is necessary to show its bearing on the present inquiry is reproduced on pages 30 and 31.

It may be observed here that the 100th meridian of longitude is inaccurately located on this map. That meridian, astronomically located, is more than one hundred miles farther west than is indicated by the Melish map. This fact is clearly shown by the record, and is not seriously questioned.

By the treaty of 1828, between the United States of America and the United

* 30

No. 2. Melish Map of 1818, Western Half.

* 31

No. 2. Melish Map of 1818, Eastern Half.

GR. OSAGE VIL.
Osage Vil.
Cadodaquis
Nadaco
Natchitoches
Sabine
Nassonis de Dios
Nacogdoches
Presidio
Rio Grande
Arkansa R.
Red R.
Washita R.
Sabine R.
Trinity R.
Neches R.
Colorado R.
Brazos R.
Rio Bravo
Missisipi R.
Missouri R.
Illinois R.
Ohio R.
Cumberland R.
Tennessee R.
Alabama R.
Yazoo R.
Mississippi R.
Lake Michigan
Lake Superior
Lake Erie
Lake Ontario
Lake Huron
Lake Winnipeg
Lake Winnipic

Mexican States, concluded January 12, 1828, the dividing limits of the respective countries were declared to be the same as those fixed by the treaty of 1819. 8 Stat. 372.

The Republic of Texas, by an act passed December 19, 1836, declared that the civil and political jurisdiction of that Republic extended to the following boundaries, to wit: "Beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line, as defined in the treaty between the United States and Spain, to the beginning; and that the President be, and is hereby, authorized and required to open a negotiation with the government of the United States of America, so soon as, in his opinion, the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty." 1 Sayles' Early Laws of Texas, Art. 257.

On the 25th of April, 1838, a convention was concluded between the United States and the Republic of Texas for marking the boundary referred to in the above treaty of 1828, as follows:

"Whereas the treaty of limits made and concluded on the twelfth day of January, in the year of our Lord one thousand, eight hundred and twenty-eight, between the United States of America of the one part and the United Mex-
*32 ican States of * the other, is binding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the United Mexican States; And whereas it is deemed proper and expedient, in order to avoid future disputes and collisions between the United States and Texas in regard to the boundary between the two countries as designated by said treaty, that a portion of the same should be run and marked without unnecessary delay: The President of the United States has appointed John Forsyth their Plenipotentiary, and the President of the Republic of Texas has appointed Memucan Hunt its Plenipotentiary; and the said Plenipotentiaries having exchanged their full powers, have agreed upon and concluded the following articles: Article I. Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the termination of twelve months from the exchange of the ratifications of the convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red River. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. Article II. And it is agreed that until this line is marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised." Treaties and Conventions, 1079, ed. 1889. By the act of Congress of January 11, 1839, c. 2, provision was made for carrying this convention into effect. 5 Stat. 312. It does not appear that anything of importance was accomplished under that act.

*33 * By a joint resolution passed March 1, 1845, Congress consented that "the territory properly included within and rightfully belonging to the Republic of Texas" might be erected into a State to be admitted into the Union, one of the conditions of such consent being that the new State be formed, subject to the adjustment by the United States of all questions of boundary that might arise with other governments. 5 Stat. 797. The conditions prescribed were accepted by Texas. 1 Sayles' Early Laws of Texas, Art. 1531. And by the joint resolution of Congress, approved December 29, 1845, Texas was admitted as one of the States of the Union, on an equal footing in all respects with the original States. 9 Stat. 108.

Then came the act of Congress, approved September 9, 1850, c. 49, 9 Stat. 446, entitled "An act proposing to the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico." By that act certain propositions were made to the State of Texas, which, being accepted, were to be binding upon the United States and the State. Among them were the following:

"First. The State of Texas will agree that her boundary *on the north* shall commence at the point *at which the meridian of one hundred degrees west from Greenwich* is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico. Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she *agrees to establish* by the first article of this agreement. Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the sur-
*34 render * to the United States of her ships, forts, arsenals, custom houses, custom-house revenues, arms and munitions of war, and public buildings, with their sites, which became the property of the United States at the time of the annexation. Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten million dollars in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States," and agreed to "be bound by the terms thereof, according to their import and meaning." 9 Stat. 446, 447.

The State accepted these propositions by an act, approved November 25, 1850, and agreed to "be bound by the terms thereof according to their import and meaning." 2 Sayles' Early Laws of Texas, Art. 2127.

In the light of these general facts, we recur to the treaty of 1819, from which it will be seen that the line agreed upon—starting from the point where the line due north from the Sabine River, at the 32d degree of latitude, strikes the Rio Roxo of Natchitoches or Red River—followed "the course of the Rio Roxo *westward* to the degree of longitude 100 west from London and 23 from Washington."

The contention of the United States is that this requirement cannot be met

except by going westward along and up the Prairie Dog Town Fork of Red River to the point where (as shown on the first of the above maps) that river intersects the 100th meridian—the government claiming that that river, and not the North Fork of Red River, is a continuation or the principal fork of the Red River, of the treaty.

The State insists that, even if the treaty be interpreted as referring to the true 100th meridian of longitude, and not to that meridian as located on the Melish map of 1818, "the course of the Rio Roxo westward" from the intersection of the line extending north from Sabine River to Red River, takes the line, not westwardly along the Prairie Dog Town Fork of Red River, but northwardly and northwestwardly up the North Fork of the Red River, (from its inter-
*35 section * with Red River,) to the point where the latter fork crosses the true 100th meridian, between the thirty-fifth and thirty-sixth degrees of latitude.

But at the outset of the discussion the State propounds this proposition: That the treaty of 1819 having declared that the boundary lines between the United States and Spain should be as laid down on Melish's map of 1818, it is immaterial whether the location of the 100th meridian of longitude on that map was astronomically correct or not, or whether the one or the other fork of Red River was or is the continuation of the main river; that the map of Melish having fixed the 100th degree of longitude west from Greenwich below and east of the mouth of the North Fork of Red River, as now known, is conclusive upon both governments, their privies and successors. If this position be sound, the case is for the State; for it is conceded that the entire territory in dispute is *west* of the 100th meridian, *as that meridian appears on the Melish map of* 1818, although it is, beyond all question, east of the true 100th meridian, astronomically located and as long recognized both by the United States and Texas.

The State's answer thus presents this issue: "That the line of said 100th meridian of longitude west from London, as laid down on said map of Melish, Intersects the Rio Roxo, or Red River, a distance of many miles east of what is claimed by the complainant to be the true line of said meridian, and many miles east of the point where the Kecheahquehono [Prairie Dog Town Fork of Red River] empties its waters into the Rio Roxo of the treaty; and said meridian so laid down on Melish's map and extended north to the 42d parallel of north latitude includes, *as territory properly belonging to and conceded to Spain* under the terms of the treaty, *and belonging of right to Texas* by virtue of the establishment of her independence, a large part of the lands *now belonging to the Chickasaw and other tribes of Indians, under concessions by treaty, as well as a portion of the present States of Kansas and of Colorado, and a part of the territory of New Mexico.* Defendant shows that long before and after the date of
*36 said treaty of 1819 the King of Spain claimed all this territory * lying west of said 100th meridian of longitude and south of said 42d parallel of latitude as laid down upon Melish's map; and in effectuation of such claim exercised repeated acts of ownership and dominion over the same without question; and after securing her independence and establishment as an independent nation, the United Mexican States likewise asserted their dominion and authority over said territory; and Texas, both as a separate Republic and as a State of the Union, has claimed and exercised complete ownership and dominion over said territory, including the territory now in controversy, by occupation of said territory by her

armies, and by extending the operation of her laws over the same, and by various other acts and declarations, until the happening of the matters and things now here to be shown and set forth."

Referring to the pleadings and to the act of Congress of January 31, 1885, in which the terms of the treaty are recited, and which directs the commissioners appointed under it to "mark the point where the 100th meridian of longitude crosses Red River in accordance with the terms of the treaty," the counsel for the State says: "But if the intersection of the 100th meridian of longitude with the parallel 36° 30′ north latitude, constituting the beginning of the north boundary line of Texas under the act of 1850, 9 Stat. 446, c. 49, shall be held to mean the actual, and not the Melish, intersection, it does not follow that the actual and not the Melish 100th meridian constitutes the eastern boundary line of the State. . . . Nor is the situation altered by the fact that this construction will leave *for future determination* the ownership of a portion of the northeastern territory."

If, as asserted by the State, this case should be determined upon the basis that the 100th meridian is where the Melish map located it, and not where it is in fact, this court may well decline to recognize a claim attended with such grave consequences as those suggested by the answer, unless it be clearly established.

Undoubtedly, the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be ex-
*37 amined in order that the real intention * of the contracting parties may be ascertained. 1 Kent Com. 174. For that purpose the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty. *McIver's Lessee* v. *Walker,* 9 Cranch, 173; *McIver's Lessee* v. *Walker,* 4 Wheat. 444; *Noonan* v. *Lee,* 2 Black, 499; *Cragin* v. *Powell,* 128 U. S. 691, 696; *Jeffries* v. *Omaha Land Co.,* 134 U. S. 178, 194. But are we justified, upon any fair interpretation of the treaty, in assuming that the parties regarded that map as absolutely correct, in all respects, and not to be departed from in any particular or under any circumstances? Did the contracting parties intend that the words of the treaty should be literally followed, if by so doing the real object they had in mind would be defeated? The boundary line was to begin at the mouth of the river Sabine, and continue north along the western bank of that river to the 32d degree of latitude. Was it intended that the Melish map should control in fixing the point where the Sabine River met that degree of latitude? Was the line due north from Sabine River to Red River to begin at the intersection of Sabine River with the true 32d degree of latitude, or where Melish's map indicated the place of such intersection? The two governments certainly intended that the line should be run from the Gulf along the western bank of the Sabine River, and after it reached Red River that it should follow the course of that river, leaving both rivers within the United States. But it cannot be supposed that they had in view the intersection of Sabine River with any degree of latitude other than the true 32d degree of latitude, nor the crossing of the line extending along the Red River westward with any meridian of longitude other than the true 100th meridian. The fourth article of the treaty shows that the contracting parties contemplated that the line should be fixed with more precision than it was then possible to do; and to that end provision was made for the appointment of commissioners and surveyors, who should run and mark it, and designate exactly the limits of both nations—the results of such

proceedings, it was declared, to be considered part of the treaty, having the
*38 same force as if * inserted therein. Melish's map of 1818 was taken as a general basis for the adjustment of boundaries, but the rights of the two nations were made subject to the location of the lines, with more precision, at a subsequent time, by commissioners and surveyors appointed by the respective governments. So far as is disclosed by the diplomatic correspondence that preceded the treaty, the negotiators assumed for the purposes of a settlement of their controversy that Melish's map was, in the main, correct. But they did not and could not know that it was accurate in all respects. Hence they were willing to take it as the basis of a final settlement, the fixing of the line with more precision, and the designating of the limits of the two nations with more exactness, to be the work of commissioners and surveyors, who were to meet at a named time, and the result of whose work should become a part of the treaty. While the line agreed upon was, speaking generally, to be as laid down on Melish's map, it was to be fixed with more precision, and designated with more exactness, by representatives of the two nations.

But there is another, and perhaps, stronger view of this question, and which is equally conclusive, even if the 100th meridian originally contemplated by the treaty of 1819 were assumed to have been the erroneous meridian line of Melish's map. This view rests upon the official acts of the general government and of Texas, and requires that the present controversy shall be determined upon the basis that the line, which by the treaty was to follow "the course of the Rio Roxo westward," extends to the true 100th meridian, thence by a line due north.

As heretofore stated, the Republic of Texas, by an act passed December 19, 1836, declared that its civil and political jurisdiction extended to the following boundaries: "Beginning at the mouth of the Sabine River and running west along the Gulf of Mexico three leagues from the land, to the mouth of the Rio Grande; thence up the principal stream of said river to its source; thence due north to the forty-second degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain,
*39 to * the beginning." The President of that Republic was authorized and required by the same act to open a negotiation with the United States to ascertain and define the boundary as agreed upon in that treaty. 1 Sayles' Early Laws of Texas, Art 257. This boundary had not been defined when Texas was admitted as a State into the Union, with the territory "properly included within and rightfully belonging to the Republic of Texas." The settlement of that question, together with certain claims made by Texas against the United States, were among the subjects that engaged the attention of Congress during the consideration of the various measures constituting the Compromises of 1850. The result was the passage of the above act of September 9, 1850, c. 49, the provisions of which were promptly accepted by the State of Texas. This legislation of the two governments constituted a convention or contract in respect of all matters embraced by it. The settlement of 1850 fixed the boundary of Texas "on the north" to commence at the point at which *the 100th meridian* intersects the parallel of 36° 30′ north latitude, and from that point the northern line ran due west to the 103d meridian, thence due south to the 32d degree of north latitude, thence on that parallel to the Rio Bravo del Norte, and thence with the channel of that

river to the gulf of Mexico. Texas, in the same settlement, ceded its claim to territory exterior to the limits and boundaries so established, and relinquished all claims upon the United States for liability for its debts, and for compensation or indemnity for the surrender to the United States of its ships, forts, arsenals, custom houses, custom-house revenues, arms and munitions of war and public buildings, with their sites, which became the property of the United States at the time of the admission of the State into the Union. In consideration of that establishment of boundaries, cession of claim to territory, and relinquishment of claims, the United States agreed to pay and has paid to Texas the sum of ten millions of dollars. 9 Stat. 446.

The words "the meridian of one hundred degrees west from Greenwich," in the act of 1850, manifestly refer to the true 100th meridian, and not to
*40 the 100th meridian as located * on the Melish map of 1818. The precise location of that meridian has not been left in doubt by the two governments. The United States has erected a monument at the point where the 100th meridian is intersected by the parallel of 36° 30′ north latitude. This was done many years ago, upon actual survey, and Texas has, by its legislation, often recognized the true 100th meridian to be as located by the United States. Looking at the above map of 1892, it will be seen that the counties of Lipscomb, Hemphill, Wheeler, Collingsworth and Childress are all immediately west of the 100th meridian. These counties were established in 1876. 3 Sayles' Early Laws of Texas, Art. 4285. The boundaries of each, as defined in the legislative enactments of Texas, are given in the margin.[1] It will be seen that the eastern boundary of each county is the 100th meridian. By the act creating Lipscomb County, its boundary immediately south of the parallel of 36° 30′ north latitude, begins "at a monument on the intersection of the 100th meridian and the thirty-sixth and a half degree of latitude." That monument is the one established by the United States after

[1] *The county of Lipscomb.*—Beginning at a monument on the intersection of the one hundredth meridian, and the thirty-sixth and a half (36½) degree of latitude, 1629 feet north of the 132d mile post *on the one hundredth meridian;* thence west thirty miles to the thirtieth mile post on the 36½ degree of latitude; thence south thirty miles and 1629 feet; thence east thirty miles to the 102d mile post; thence north thirty miles and 1629 feet to the beginning.

The county of Hemphill.—Beginning at the northeast corner of Roberts County, and the southeast corner of Ochiltree County and southwest corner of Lipscomb County; thence east thirty miles to the southeast corner of Lipscomb County, to the 102d mile post *on the one hundredth meridian;* thence south thirty miles to the 72d mile post; thence west thirty miles to the southeast corner of Roberts County; thence north thirty miles to the place of beginning.

The county of Wheeler.—Beginning at the 72d mile post, on the one hundredth meridian, the southeast corner of Hemphill County; thence west thirty miles to the southwest corner of Hemphill County and the southeast corner of Roberts County; thence south thirty miles; thence east thirty miles to the 42d mile post, *on the one hundredth meridian;* thence north thirty miles to the place of beginning.

The county of Collingsworth.—Beginning at the northeast corner of Donley County and southeast corner of Gray County, and southwest corner of Wheeler County; thence east thirty miles to the southeast corner of Wheeler County at the 42d mile post, *on the one hundredth meridian;* thence south thirty miles; thence west thirty miles to the southeast corner of Donley County; thence north thirty miles to the place of beginning.

The county of Childress.—Beginning at the southeast corner of Collingsworth County at the 12th mile post, *on the one hundredth meridian;* thence west 23 miles; thence south thirty miles; thence east about thirty-five miles, to the new west line of Hardeman County; thence north to Prairie Dog Town River; thence up said river to the *initial monument on the one hundredth meridian;* thence north to the 12th mile post at the place of beginning. 3 Sayles' Early Laws of Texas, Art. 4285.

the settlement of 1850. Peculiarly significant is the boundary of Childress County, one of the lines of which runs up Prairie Dog Town River—which
*41 river, the United States insists, constitutes the southern boundary of * the territory in dispute—"to the initial monument on the 100th meridian." The "initial monument" here referred to was erected in 1857 under the authority of the United States to mark the place where, as its representatives then and have ever since claimed the line, "following the course of the Rio Roxo westward," crossed the 100th meridian.

It thus appears that the two governments, with knowledge that the treaty of 1819 referred to Melish's map of 1818, have, by official action, declared that the 100th meridian is located on the line that marks the eastern boundaries of the counties of Lipscomb, Hemphill, Wheeler and Collingsworth, in the State of Texas. Besides, the proof in the cause leaves no room to doubt that the true 100th meridian is, as shown by the above map of 1892, immediately east of those counties. The acts of the two governments and the evidence, therefore, concur in showing that the 100th meridian is not correctly delineated on the Melish map of 1818. And in the above settlement of a part of the boundary lines between the United States and Texas, the two governments have accepted the true 100th meridian and discarded the Melish 100th meridian. Giving effect to the compromise act of 1850, the suggestion that the 100th meridian must be taken, in the present controversy, to be as located on the Melish map of 1818, is wholly inad-
*42 missible. It cannot be supposed that the United States * would have agreed to pay ten millions of dollars to the State of Texas, as provided in the act of 1850, if it had been suggested that any dispute in respect of boundary not covered by that act, and so far as such dispute depended upon degrees of longitude, was to be determined otherwise than by reference to the true 100th meridian. Assuming that the two governments did not intend by the settlement of 1850 to fix the point where the line, "following the course of the Rio Roxo westward," crossed the 100th meridian, nevertheless it is inconceivable that the two governments intended that, in establishing the boundary of Texas "on the north," the 100th meridian mentioned in the enactment of 1850 should be the true 100th meridian, but that the State should be at liberty to insist, in respect of its boundary *along Red River*, that the 100th meridian be taken to be as delineated on the Melish map, and thereby obtain all the land, within the limits of Indian Territory, between the true 100th meridian and the Melish 100th meridian.

We have said that the treaty itself, upon a reasonable interpretation of its provisions, left it open to the contracting parties, through commissioners and surveyors, to fix the lines with precision, and, therefore, to show, by competent evidence, where the true 100th meridian was located. But if this were not so, we should feel obliged to hold that the convention or contract between the United States and Texas, as embraced in their respective enactments of 1850, together with the subsequent acts of the two governments, require in the determination of the present controversy that the 100th meridian, mentioned in the treaty of 1819, be taken to be the true 100th meridian, and consequently, that the line, "following the course of the Rio Roxo westward to the degree of longitude 100 west from London," must go, and was intended to go, to the true or actual 100th meridian, and not stop at the Melish 100th meridian.

So that the real question for solution is whether, as contended by the

United States, the line "following the course of the Rio Roxo *westward* to the degree of longitude 100 west from London," meets the 100th meridian at
*43 the point where * Prairie Dog Town Fork of Red River crosses that meridian, or whether, as contended by the State, it goes *northwestwardly* up the North Fork of Red River until *that* river crosses the 100th meridian many miles due north of the initial monument established by the United States in 1857.

Upon this point the evidence is very voluminous. Much of it, we feel constrained to say, is of little value, and tends only to confuse the mind in its efforts to ascertain what was within the contemplation of the negotiators of 1819.

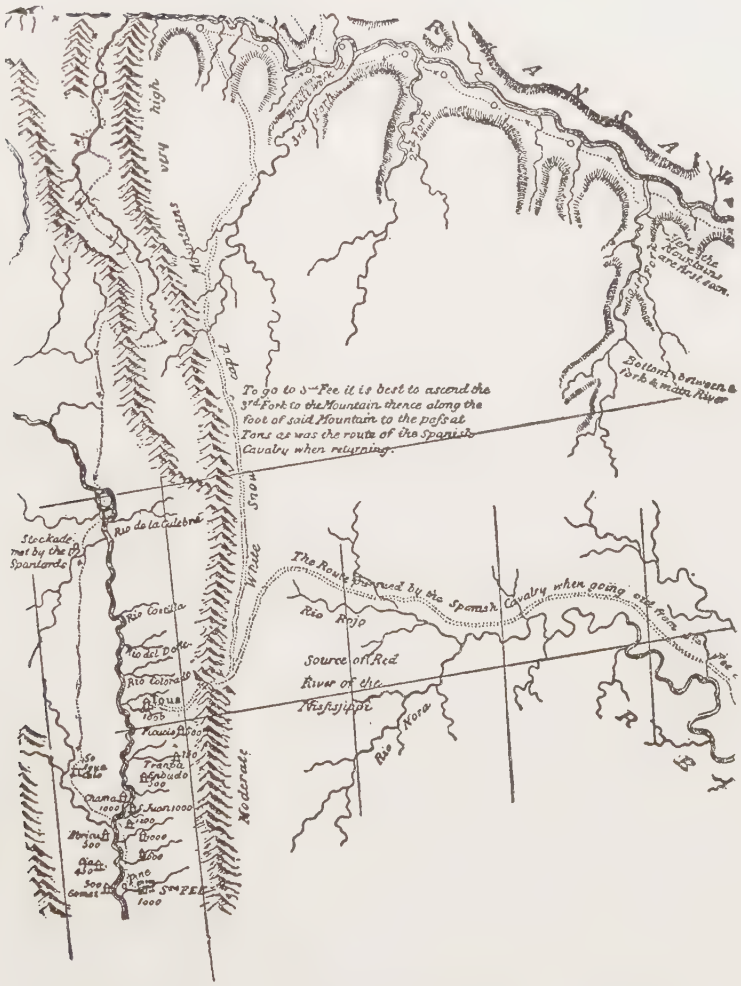
It is a matter of great regret that the question now presented, involving interests of great magnitude, should not have been determined, in some satisfactory mode, before or shortly after Texas was admitted as one of the States of the Union. It has remained unsettled for so long a time that it is not now so easy of solution as it would have been when the facts were fresh in the minds of living witnesses who had more intimate knowledge of the circumstances than any one can now possibly have upon the most thorough investigation.

Before looking at the Melish map of 1818, it will be proper to inquire as to the general course of Red River, so far as any information had been given to the public prior to the making of that map. Probably the most trustworthy publication on the subject is Pike's "Account of expeditions to the sources of the Mississippi and through the western parts of Louisiana to the source of the Arkansaw, Kan, La Platte and Pierre Juan Rivers, performed by order of the government of the United States, during the years 1805, 1806 and 1807; and a tour through the interior parts of New Spain, when conducted through these provinces by order of the Captain General in the year 1807." This work was copyrighted in 1808 and published at Philadelphia in 1810. It was illustrated by numerous charts, copies of which are found on pages 44, 45, 46, 47, *post*—one of them being "A Chart of the Internal Part of Louisiana," the other, "A Map of the Internal Provinces of New Spain." Those charts show a large river called Red River, extending from a point near Santa Fé between latitude 37° and 38° across what is now the State of Texas, passing Natchitoches,
*48 Louisiana. Both show a chain of mountains * running north and south, marked on one chart as "White snow capped mountains, very high."

These are undoubtedly the Snow Mountains referred to in the letter of Mr. Adams to the Spanish minister, of October 31, 1818, in which, as we have seen, the former proposed that the line from east to west should follow the course of Red River "to its source, touching the chain of the Snow Mountains, in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts." East of the Snow Mountains, as delineated on these charts, are two prongs or small streams, "Rio Rojo" and "Rio Moro," the source of the former being northeast, and the latter nearly east, of Santa Fé. The Rio Rojo rises between the 37th and 38th, and the Rio Moro between the 36th and 37th degrees of latitude, both near the 106th degree of longitude. Between those prongs, on one of the charts, are the words "Source of Red River of the Mississippi." The prongs or streams Rio Rojo and Rio Moro unite at about the 37th degree of latitude, and form one stream, marked on one chart as Red River, and on the other as "Rio Colorado [Red River] of Natchitoches." The stream, thus formed, runs for a short distance eastwardly, then southeastwardly until it reaches a point a little west of the

*44

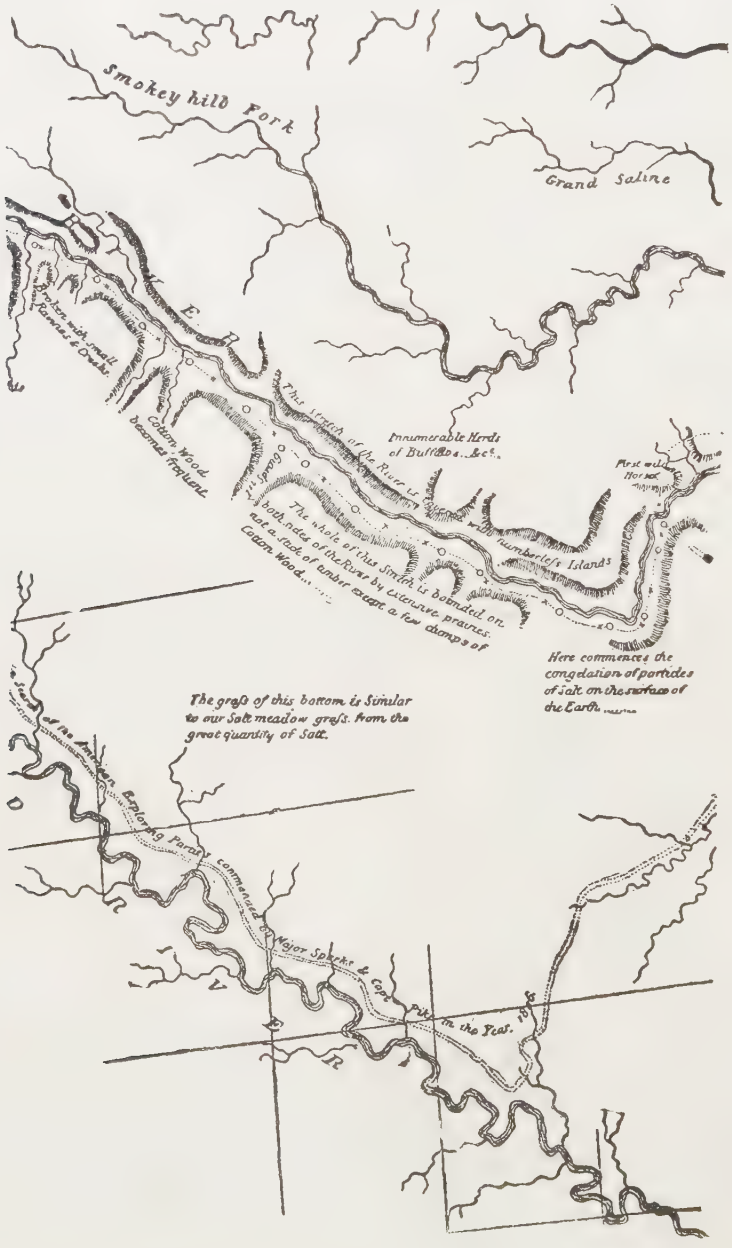
No: 3. Western Half.


Red
Snow
White
Stockade
Rio de la Culebra
Rio Colorado
Rio Rojo
Source of Red River of the Mississippi
Rio Norte
Mexico
Bottom of Arkansaw R.
Here the Mountains cease
To go to S.W. See it is best to ascend the 3rd Fork to the Mountain thence along the foot of said Mountain to the pass at Taos as was the route of the Spanish Cavalry when returning.
The Route pursued by the Spanish Cavalry when going and return

PIKE'S CHART OF THE INTERNAL PART OF LOUISIANA, &C.—PT. 1—1810.

*45

No. 3. Eastern Half.


Smokey hill Fork
Grand Saline
Cotton Wood becomes frequent
Innumerable Herds of Buffaloes &c.
Here commences the congelation of particles of Salt on the surface of the Earth
The grass of this bottom is Similar to our Salt meadow grass. from the great quantity of Salt.
Major Sibley & Capt. Pike in the Year 1806

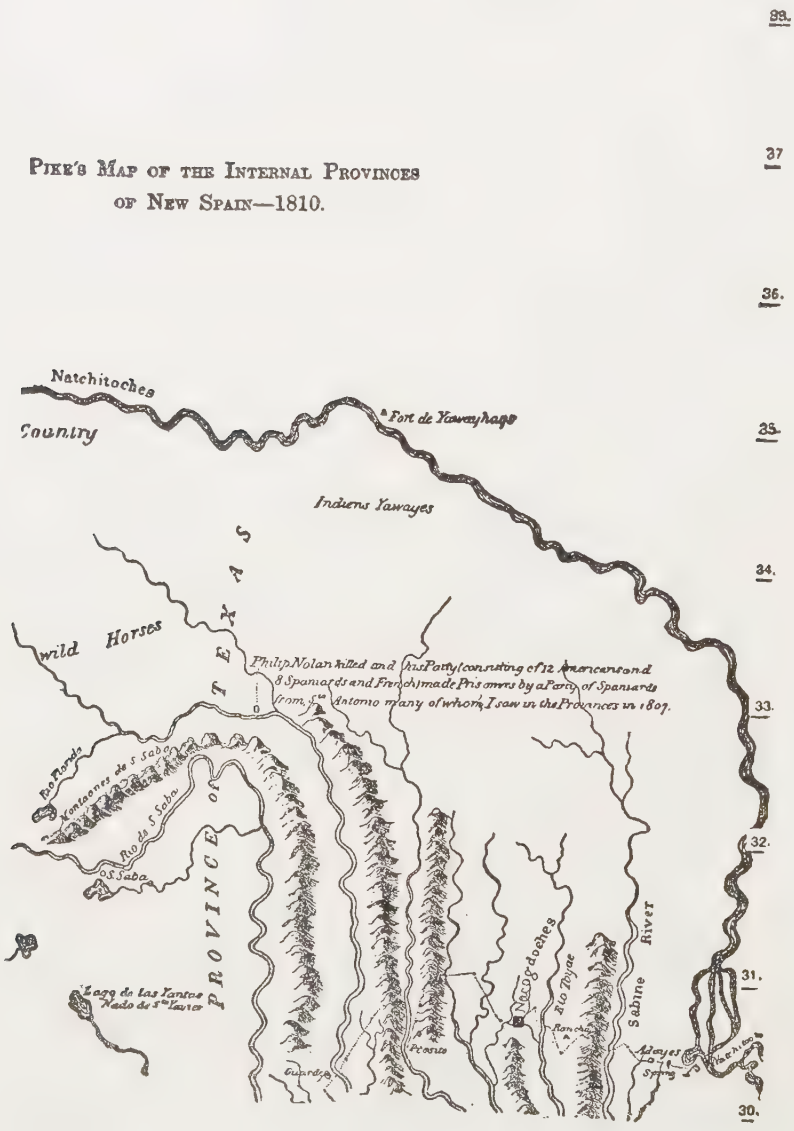
*46

No. 4. Western Half.
Rio Rojo
Rio Norte
Rio Mora
Rio Colorado de Ietun
Sierra Obscura
Sierra de el Sacramento
Sierra de Guadelupe
Immense Herds of
Immense Herds of wild Horses
NEW MEXICO
Apaches Faraons
Apaches Mescaleros
Apaches Vacaderos
Rio Pecos
PASSO
Pass del Norte
Sierra de la Cola
Sierra de los Organos
Sierra de las Piedras de Mesa
Ojo de Leonio
Pass del Norte o de las Sanias
Copper works
Road
Horse
Dead
La Selmera
Tarantula
Chalalaba
Chapatos
Yerba
Aguila
Tanos
Abiqui
Tesuque
Sobaipe
Sibolata
Chiquito
Tompa
Sta Fee
Albuquerque
S. Fernandez
S. Thomas
S. Dies
S. Bernalillo
Domingo
Xemez
Village
Pecos
Laguna
Acoma
Zuni
Moqui
Christopher
S. Diego
Lago del Muerto
Las Ponundos
Montagnes de Sylvres
Indians Vetors
Rio Puerco
Sierra de Guadelupe

*47

No. 4. Eastern Half.

PIKE'S MAP OF THE INTERNAL PROVINCES OF NEW SPAIN—1810.



100th meridian, then eastwardly, then a little northeastwardly, then southeastwardly, passing Natchitoches, to a junction with the Wichita River near the Mississippi River. It should also be stated that on these charts is marked a road or line extending from Tous, (which is north of Santa Fé,) through a gap of the Snow Mountains, and thence along the north side of Red River. That line is described as "The route pursued by the Spanish cavalry when going out from Santa Fé in search of the American exploring parties commanded by Major Sparks and Captain Pike in the year 1806." These charts or maps, in connection with the chart of the lower part of Red River, not here reproduced, also show throughout the entire distance from Natchitoches to the source of Red River near the Snow Mountains, small streams emptying into the main river from the north and northwest, none of which, however, are marked with
*49 names; and that North of Red River, as delineated by * Pike, and east of the 100th meridian of longitude, is an unnamed stream, not of great length, but having the same general course as the stream now known as the North Fork of Red River.

That prior to Melish's map of 1818 it was believed that the Red River that passed Natchitoches had its source in the mountains near Santa Fé is manifest from Melish's own publications. In 1816 he published at Philadelphia a small book, with the title "A geographical description of the United States with the contiguous British and Spanish possessions." It accompanied his map of those countries. In that work it appears that he used Humboldt's map of 1804, and Pike's Travels. He said: "The Red River rises in the mountains to the eastward of Santa Fé, between north latitude 37° and 38°, and, pursuing a general southeast course, makes several remarkable bends, as exhibited on the map; but it receives no very considerable streams until it forms a junction with the Wachitta, and its great mass of waters, a few miles before it reaches the Mississippi." pp. 13 and 39. See also the third edition of his work published in 1818, pp. 14 and 42.

On Darby's map of the United States, including Louisiana, published in 1818, and prefixed to his "Emigrant's Guide," appears the "Red River of Natchitoches," formed by two prongs, and extending southeastwardly from a point near the intersection of the 107th degree of longitude and the 40th degree of latitude to its junction with waters near the Mississippi. East of the 100th meridian are two unnamed streams coming from the northwest, each much shorter than the main Red River, as delineated on that map. It is stated in this work that the Red River "rises near Santa Fé in N. lat. 37° 30′ and 29° west of Washington, runs nearly parallel to the Arkansas, joins the Mississippi at 31° N. lat. after a comparative course of 1100 miles." p. 50.

In view of the facts stated, particularly in view of Melish's knowledge of Pike's publication and the statements in his own work, it cannot be doubted that when the Melish map of 1818 was published it was believed that there was a Red River that continued without break from its source near Santa Fé or
*50 the * Snow Mountains until it joined other waters east and southeast of Natchitoches, near the Mississippi.

Following the course of Red River, as laid down on the Melish map of 1818, it is impossible to doubt that in the mind of Melish the Red River was the stream represented by Pike as having two prongs, Rio Rojo and Rio Moro, near

Santa Fé, and as running without break, first easterly, then southeastwardly, then eastwardly for a comparatively short distance, and then southeastwardly to its mouth near the Mississippi River. On the north and east of Red River, as thus marked, there was no stream connected with it that was marked by any name. There was an unnamed stream, on the north side of the main river, which emptied into the latter between the 101st and 102d degrees of west longitude *as defined on that map*. If regard be had alone to the map of 1818, it is more than probable that the river marked on it as having near its source two prongs, Rio Rojo and Rio Moro, and which formed one stream that continued without break southeastwardly, and *into which,* between the 101st and 102d degrees of longitude, as *marked on that map,* came from the northwest an unnamed stream, was the river designated on Pike's chart as Red River, and was the Red River of the treaty of 1819. The suggestion that the river marked on the Melish map as having the two prongs, Rio Rojo and Rio Moro, and running southeastwardly, was the river now known as the North Fork of the Red River, is without any substantial foundation upon which to rest. If the latter river is delineated at all on the Melish map, it is the unnamed stream that entered the main river from the northwest, between the 101st and 102d meridians as located on that map.

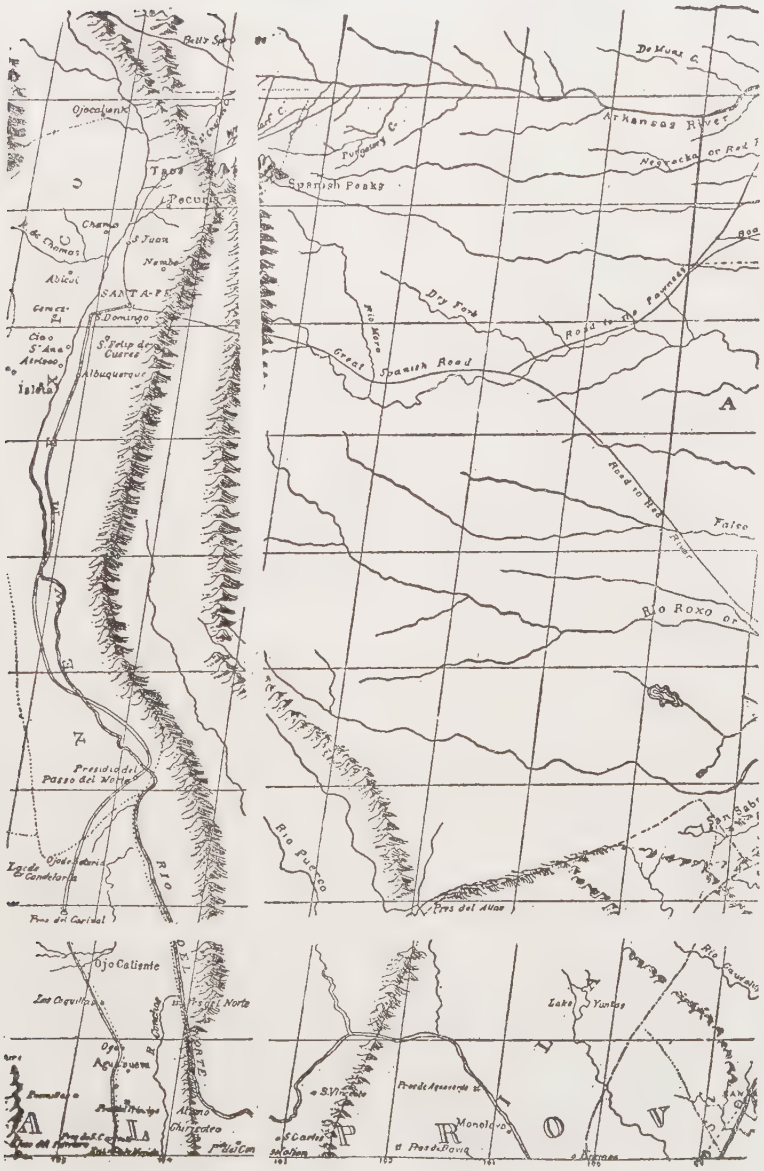
There is a large amount of evidence of a documentary character showing that this interpretation of the Melish map is correct. We have before us "A map of the United States, with the contiguous British and Spanish possessions, compiled from the latest and best authorities by John Melish." It was copyrighted June 16, 1820, and published at Philadelphia by Finlayson, the successor of Melish. A part of that map is reproduced on pages 52, 53. It is spoken of as Melish's map of 1823, because that is the year to which it was
*51 improved. * From that map it appears that a line up the Rio Roxo or Red River, from the northeastern corner of Texas to the 100th meridian, is substantially an east and west line, and that west of the 100th meridian it is westward and northwestwardly *to a point near Santa Fé and the Snow Mountains.*

If the case depended upon that map it could not be doubted that the territory in dispute is outside of the limits of Texas. The direction of the treaty is to run *westward,* not northwestwardly, on Red River *to the 100th meridian.* According to the view pressed by the State, the true line extends, from the junction of the North Fork of Red River with Red River, northwardly, then easterly, then northwestwardly *up that fork,* although at such junction there is another wide stream, coming almost directly from the west, and which fully meets the requirement of the treaty to follow the course of the Red River *westwardly* to the 100th meridian. We do not feel authorized to assent to this view. In our judgment the direction in the treaty to follow the course of the Red River *westward* to the 100th meridian takes the line, not up the North Fork, but westwardly with the river now known as the Prairie Dog Town Fork, or South Fork of Red River, until it reaches that meridian, thence due north to the point where Texas agreed that its line "on the north" should commence.

This conclusion is strongly fortified by an inspection of the numerous maps placed before us, and which were made prior to February 8, 1860, on which day the legislature of Texas, with knowledge that the territory in dispute was claimed by the United States, passed an act creating the county of Greer, and thereby assumed that it was part of the territory properly and rightfully belong-

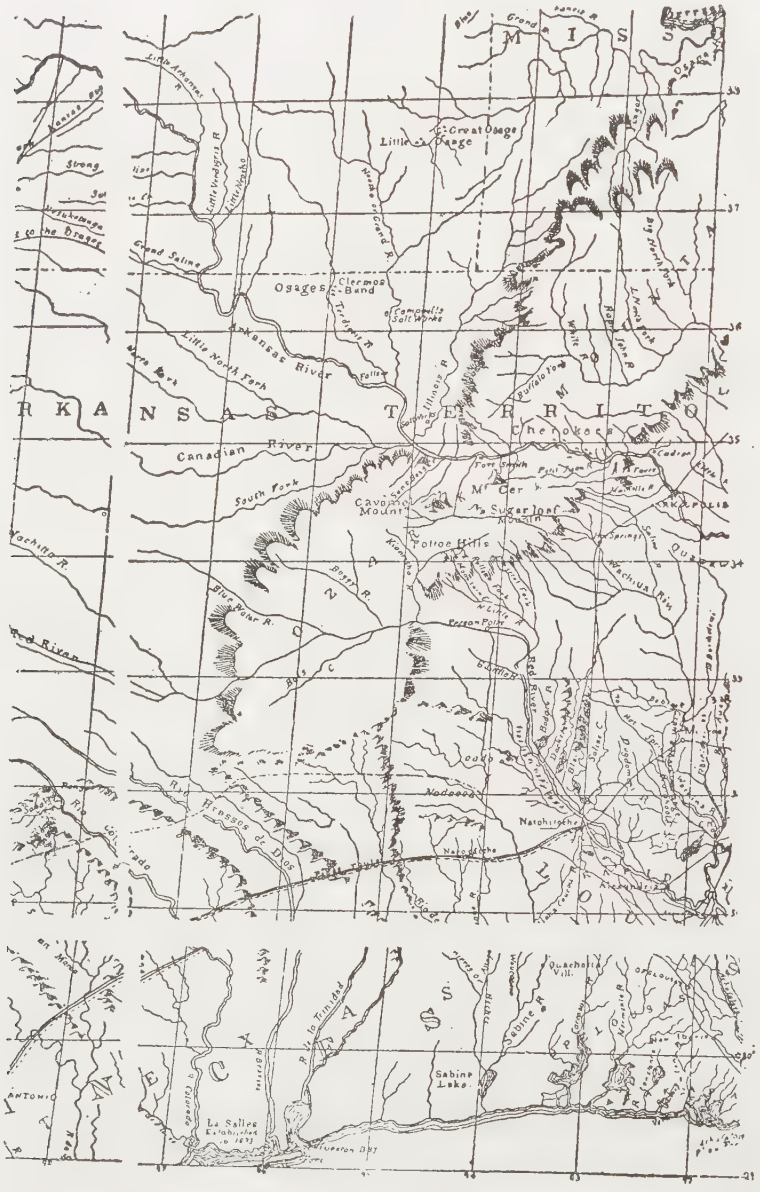
*52

No. 5. Melish Map of 1823, Western Half.



* 53

No. 5. Melish Map of 1823, Eastern Half.



ing to that State, at the time its independence was achieved, as well as when it was admitted into the Union. 2 Sayles' Early Laws of Texas, Art. 2886. Every map before us, published after the treaty of 1819 and prior to 1860, beginning with the Melish map of 1823, shows that the line, going from east to west, followed the course of Red River westward until it crossed the true 100th meridian at or near the southwest corner of the territory designated as
*54 "Unassigned Land." Upon each and all of these maps appear * streams coming from the northwest, having a northwest and southeast course, that empty into the main river. But none of those streams are marked as a part of the line established by the treaty of 1819.

Among the maps to which we refer are the following: 1. "A map of Mexico, Louisiana and the Missouri Territory, including the States of Mississippi, Alabama Territory, East and West Florida, Georgia, South Carolina and part of the Island of Cuba," by John H. Robinson, M.D., copyrighted in 1819, and published at Philadelphia. The author is no doubt the gentleman of the same name who accompanied Major Pike in his expeditions, and is spoken of by that officer as a man of enterprise and science. The river marked on that map as Red River east of the 100th meridian has its source in the region of Santa Fé, and corresponds with the Red River or the Rio Colorado of Natchitoches, as delineated on Pike's map. 2. Morse's map of the United States, published in 1822, and which accompanied an official report, made by him in that year to the Secretary of War, of the conditions of the various Indian tribes of the country. On this map appears Red River with its source not far from Santa Fé, and running southeastwardly to a short distance west of the 100th meridian, from which point it extends eastwardly all along the southern line of Indian Territory, thence southeastwardly to the Mississippi. 3. Carey & Lea's Atlas of 1822. On this map appears Red River having a *westward* course the entire distance from about the 94th to the 102d degree of longitude, between the 33d and 34th degrees of latitude, and constituting the southern line of the Indian Territory. Red River on this map has its source near the Snow Mountains. 4. The map of Major Long, of the Topographical Engineers, inscribed to Mr. Calhoun, Secretary of War, and published in 1822. On this map appears a river with its source near the mountains of Santa Fé, and running southeastwardly, then eastwardly to the 100th meridian, and continuing then eastwardly along the entire line between Indian Territory and Texas. As delineated on Long's map, between the 103d and 101st meridians, that river is marked "Rio Roxo
*55 or Red River," and near the * 95th meridian it is marked "Red River." 5. Tanner's map of North America, 1822. 6. Tanner's map of North America (1823) shows a river on the south border of what is now Indian Territory, marked Red River. On each side of it, after it passes the 100th meridian, there are prongs or streams north and south, and the river, near its end, after it has passed 25° west from Washington, is marked Red River. Going off from the Red River at about 20° longitude west from Washington is the river marked False Washitta, which comes from the northwest. Red River as marked on that map extends nearer to Santa Fé than the False Washitta. 7. Finley's American Atlas (1826) shows Red River on the south boundary of Arkansas, whose course, going from the east, is westward until about the 100th meridian is reached, and west of the 100th meridian it is marked "R. Roxo or Red R."

* 56

No. 6. Western Hair.

* 57

No. 6. Eastern Half.

-YOUNG'S MAP, PUBLISHED BY MITCHELL, 1835.

At longitude 20° west from Washington a river comes from the northwest marked False Washitta. The extension marked as above is much longer than any stream emptying into Red River from the north or the northwest. 8. "A Complete historical, chronological and geographical American atlas," published by Carey & Lea, at Philadelphia, in 1826, on which will be found marked Red River, whose course going from east to west, is westwardly past the 100th meridian and then northwestwardly in the direction of Santa Fé. At about the 98th meridian a much shorter stream comes into it from the northwest, and is unmarked. 9. A German atlas of America, published at Leipsic in 1830, contains a map which shows the boundary established in 1819 on the west side of Louisiana, and shows Red River along the whole southern line of the Indian Territory. Coming into that river from the northwest, at 99° longitude, is an unmarked stream; and coming from the northwest, and emptying into Red River, at about 97° longitude, is another stream marked Falsche Washitta. 10. Young's New Map of Texas, published at Philadelphia in 1835 by Mitchell, and a copy of part of which is given on pages 56, 57. On this map appears Red River with its source a short distance from Santa Fé, and marked, east of the 100th
*58 meridian, as "Rio Roxo or Red River of Louisiana," * running first southeastwardly, then eastwardly along the southern boundary of Indian Territory. 11. Maillard's map of Texas, published in 1841, showing Red River as forming the line between the Indian Territory and Texas from about the 94th degree of longitude to the 100th meridian, having a course westward and eastward between those meridians, and marked, on the map, east of the 100th meridian, as "Rio Roxo or Red River of Louisiana." 12. A map compiled for the Department of State, under the direction of Colonel Abert and Lieutenant Emory, and published by the War Department in 1844. On this map appears Red River, whose course going from east to west, from a point near the 94th degree of longitude, is substantially westward along the whole line between the Indian Territory and Texas. After passing the 100th meridian, its course is westwardly and northwestwardly in the direction of Santa Fé. 13. Tanner's map of the United States and Mexico, published in 1846. That map shows Red River having an eastward and westward course, just south of the 34th degree of latitude, and marking the southern line of Indian Territory. 14. Colton's map of the United States, published in 1848, shows Red River forking near the 98th meridian, one fork extending westwardly and northwestwardly toward Santa Fé, marked Rio Roxo or Red River between 100° and 102°, and Red River between 102° and 104°. 15. Cordova's map of the State of Texas, "compiled from the records of the general land office of the State by Robert Creuzbaur," and published in 1849. Creuzbaur entered the land office in Texas before the admission of that State into the Union, and remained there for many years. While there he never heard of any claim by Texas to the territory now called Greer County. Upon the original of this map is a certificate by Thomas W. Ward, commissioner of the land office of Texas from January 5, 1841, to March 20, 1848, and also a certificate by his successor, George W. Smyth. Ward certified that the map had been compiled by Cruezbaur from the records of the general land office of Texas, and that it was the most correct representation of the State he had seen or which had come to his knowl-
*59 edge; "the meanders of * the rivers are all correctly represented, being made from actual survey." Smyth certified that he "has no hesitancy in declaring it as his firm conviction that this map is a very correct representation of the State,

representing all returns up to date, having been compiled with great care from the records of the general land office." On this map is also the certificate of the governor and secretary of state as to the official character of Ward and Smyth. It is further attested, under date of August 12, 1848, by Senators Rusk and Houston, and by Representatives Kauffman and Pilsbury, as follows: "We, the undersigned Senators and Representatives from the State of Texas, do hereby certify that we have carefully examined J. de Cordova's map of the State of Texas, compiled by R. Creuzbaur from the records of the general land office of Texas, and have no hesitation in saying that no map could surpass this in accuracy and fidelity. It has delineated upon it every county in the State, its towns, rivers and streams, and we cordially recommend it to every person who desires correct geographical information of our State. To the persons desirous of visiting Texas it would be invaluable." 16. Mitchell's New Atlas of North and South America, published by Thomas Cowperthwaite & Co., Philadelphia, 1851, shows on the map of Texas a river marked Red River, whose course, after the latitude midway between 33° and 34° is reached, is westward. It continues in a westerly direction with scarcely any change until it reaches the 102d meridian, and then turns northwestwardly in the direction of Santa Fé.

All of these maps place the territory in dispute east of the 100th meridian and *north* of the southern line of the Indian Territory *as that line is claimed by the United States.* They are all inaccurate, if any part of that territory is within the limits of Texas. No one of them so locates Red River that its course, going westward (from the point where the line between Texas and Louisiana intersects the Red River) to the 100th meridian would take the line of the treaty of 1819 up the North Fork of Red River until it intersected that meridian near the 35th degree of latitude.

*60 The conclusion to be drawn from the maps to which we * have referred is sustained by other maps, namely: 1. A map of the State of Texas purporting to have been compiled by Stephen F. Austin and published at Philadelphia by H. S. Tanner in 1837. The original is in the general land office of Texas, and upon it is the certificate of the commissioner of such land office, dated March 13, 1882, showing that it was temporarily deposited in that office. 2. A map of Texas purporting to have been compiled from surveys on record in the general land office of the Republic of Texas, in the year 1839, by Richard S. Hunt and Jesse F. Randel. Upon this map is a certificate of the secretary of state of Texas, approving the map, and stating that it had been compiled "from the best and most recent authorities." This certificate is followed by one from the commissioner of the general land office of the Republic of Texas, dated April 25, 1839, stating that "the compiler of this map has had access to the records of this office, and that the map was compiled from them." 3. Disturnel's map of the United States of Mexico, published in 1847 and used at the making of the treaty of Guadalupe Hidalgo. 4. A map prepared for the President of the United States under the direction of the commissioner of the land office in 1849. 5. A. Travellers' map of the State of Texas, "compiled from the records of the general land office, the maps of the Coast Survey, the reports of the boundary commission, and various other military surveys and reconnoissances, by Charles W. Pressler." This map was published in 1867. The author held a position in the land office of Texas for more than thirty years.

But it is said that the United States has in many ways, and during a very long period, recognized the claim of Texas to the territory in dispute, and upon principles of justice and equity should not be heard at this late day to question the title of the State.

Is there any basis for the suggestion that the United States has ever acquiesced in the claim of the State that the treaty line *westward* along Red River to the 100th meridian follows the course of the North Fork from its mouth northwardly and northwestwardly until that meridian is reached at
*61 a point * north of the 35th degree of latitude? This question deserves the most careful examination; for, long acquiescence by the General Government in the claim of Texas would be entitled to great weight.

In support of the suggestion that the United States has recognized the claim of Texas, reference is made to the fact that in 1843 some Texan troops under the command of Colonel Snively went into the territory here in dispute and were arrested and disarmed by Captain Cooke of the United States Army, who had been especially assigned to the duty of protecting caravans of Santa Fé traders through the territories of the United States to the Texan frontier. Of his conduct the Republic of Texas complained. Connected with that matter was an alleged forcible entry into the custom house at Bryarly's Landing on Red River by certain citizens of the United States, and the taking therefrom of goods that had been seized as forfeited under the laws of Texas. The settlement of that dispute between the two governments is now relied on as showing a recognition by the United States of the claim of Texas to the territory here in controversy. We have been unable to find anything in the history of those proceedings to justify this contention of the State. From the letter of Mr. Calhoun, Secretary of State, to Mr. Van Zandt, Chargé d'affairs of the Republic of Texas, of date August 14, 1844, it appears that Captain Cooke's conduct in this matter was made the subject of a court of inquiry. Mr. Calhoun said: "The court was ordered, at the request of my immediate predecessor, in conformity to the intimation contained in his communication to Mr. Van Zandt, of the 19th of January last, in order to ascertain more fully and in the most authentic form the circumstances and facts connected with the proceedings of Captain Cooke and his command, in the disarming of the Texan force under the command of Colonel Snively. Mr. Van Zandt will find, on recurring to the extract, that the opinion of the court is, that the place where the Texan force was disarmed was *within the territory of the United States;* that there was nothing in the conduct of Captain Cooke which was harsh or unbecoming, and that he did not
*62 exceed the * authority derived from the orders under which he acted. It is proper to add that the court consisted of three officers of experience and high standing; that the case was fully laid before it, and that its opinion *appears to be fully sustained by the evidence.* There seems to be no doubt that Captain Cooke was sincerely of the opinion that the Texan force was within the territory of the United States, and that the fulfilment of his orders to protect the trade made it his duty, under such circumstances, to disarm them. It is readily conceded that the commander of the Texan forces, with equal sincerity, believed the place he occupied was within the territory of Texas. Which was right or which wrong can be ascertained with certainty only by an actual survey and demarcation of the line dividing the two countries between the Red and Arkansas Rivers." After ob-

serving that it was neither necessary nor advisable to renew between the two governments the discussion on the question whether the Texan force was or was not within the limits of the United States, Mr. Calhoun proceeded: "In the hope, therefore, of closing the discussion and putting an end to this exciting subject, the undersigned renews the offer of his predecessor contained in the communication above referred to, 'to restore the arms taken from the Texan force, or to make compensation for them,' and his assurance, given at the same time that 'his government never meditated and will not sanction any indignity towards the government of Texas, nor any wrongs towards her people, and will repair any injury of either kind which may be made to appear.'" This offer was accepted by the government of Texas, its Chargé d'affairs saying: "As it is not probable that the arms could be returned in the order in which they were taken, compensation will be received for them." House Ex. Doc. 28th Congr. 2d Sess. Vol. 1, pp. 12, 109-10. This was followed by an appropriation by Congress by the act of March 30, 1847, c. 47, of a sum of not exceeding $30,000, "for settling the claims of the late Republic of Texas, according to principles of justice and equity, for disarming a body of Texan troops under the command of Colonel Snively, and for entering the custom house at Bryarly's Landing, and taking
*63 * certain goods therefrom." 9 Stat. 155, 168. It seems to the court too clear to require discussion that, while, during the above controversy, the United States and Texas asserted their authority, respectively, over the place where the Texan troops were disarmed, the determination of the question of territorial boundary was expressly waived, and a settlement was reached, upon the basis indicated in the diplomatic correspondence and in the act of Congress solely (to use the words of Mr. Calhoun) to allay "irritated feelings between two countries, whose interest it is to be on the most friendly terms."

Proceeding with the inquiry whether the United States has recognized the claim of Texas to own the territory in dispute, we find that by the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw Indians, the boundary of the Choctaw and Chickasaw country was thus defined: "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point *where the meridian of one hundred degrees west longitude crosses the same;* thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning." 11 Stat. 611, 612. It may be here stated that the Kiowas, Comanches and Apaches were settled in the Choctaw and Chickasaw country, as originally defined, in virtue of the treaty of 1867. 15 Stat. 581, 582. In execution of the treaty of 1855 the Commissioner of Indian Affairs made a contract with A. H. Jones and H. M. C. Brown for a survey of some of the boundaries of the original Choctaw and Chickasaw country. From the field-notes of those surveyors, which were duly reported to the proper office, and certified to be correct by the astronomer and examiner of the Indian Boundary Survey, we make these extracts: "The initial monument for the 100th meridian west longitude boundary line between the State of Texas and the Choctaw and Chickasaw countries is established 30 chs. dist. from the north bank of Red River
*64 on an elevation near 50 ft. above the bed of the same. The situation * was

selected with a view to protect the monument so as never to be destroyed by high water. . . . The river due south from the monument is 76 chs. and 85 lks. wide from high water mark to high water mark. Course N. 85° E. It will be sufficient to say to those interested that there can be no doubt as to the fact of its being the main branch of Red River, as was doubted by some persons with whom we had conversed relative to the matter before seeing it, for the reason the channel is larger than all the rest of the tributaries combined, besides affording its equal share of water, though like the other branches in many places the water is swallowed up by its broad and extensive sand beds, but water can at any season of the year be obtained from one to three feet in main bed of stream."

We come now to the act of June 5, 1858, c. 92, by which (in harmony with the act of the legislature of Texas of February 11, 1854, 2 Sayles' Early Laws of Texas, Art. 2412) it was provided: "§ 1. That the President of the United States be, and he hereby is, authorized and empowered to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appointed by and on behalf of the State of Texas for the same purpose, shall run and mark the boundary lines between the Territories of the United States and the State of Texas: Beginning at the point where the one hundredth degree of longitude west from Greenwich crosses the Red River, and running thence north to the point where said one hundredth degree of longitude intersects the parallel of thirty-six degrees thirty minutes north latitude; and thence west with the said parallel of thirty-six degrees and thirty minutes north latitude to the point where it intersects the one hundred and third degree of longitude west from Greenwich; and thence south with the said one hundred and third degree of longitude to the thirty-second parallel of north latitude; and thence west with the said thirty-second degree of north latitude to the Rio Grande. § 2. That such landmarks shall be established at the said point of beginning on Red River, and at the other corners, on the said several lines of said boundary, as may be agreed on by
*65 the President of the United States, or * those acting under his authority, and the said State of Texas, or those acting under its authority." 11 Stat. 310.

This act was passed before Jones and Brown had completed and reported the survey made by them. Pursuant to this act of 1858 a commissioner was appointed on behalf the United States. The Secretary of the Interior in his letter of instructions to that commissioner said, among other things: "After surveying and marking that portion of the boundary defined by the parallel of 36° 30′ north latitude and which is known to you to present no obstacle to a rapid survey and demarcation, to prevent delay and expense, you will take the 100th meridian of west longitude as laid down on the map of the southern boundary of Kansas, or as determined and marked upon the surface of the earth by Messrs. Jones and Brown, surveyors of the Chickasaw and Choctaw boundaries, from observations made by Daniel G. Major, astronomer on the part of the United States, at its intersection with the Northern Creek boundary, about midway between the North Fork of the Canadian and the Canadian River, or by independent observations, whichever, in your judgment from comparison, may be found to be the most correct method. Having connected with, or observed for, the 100th meridian at its intersection with the Creek boundary, as determined by the parties

above mentioned, you will proceed as rapidly as possible over the remaining portion of this meridian to Red River, the termination of your field work, making such observations and measurements as you may deem sufficient to verify it." The governor of Texas having insisted upon the work of the survey being commenced on the Red River rather than on the north line, the Secretary of the Interior, after saying that that course would involve a serious delay in fixing the initial point of the 100th meridian, which could only be done after several months of careful astronomical observations and an exchange of observations with some fixed observatory, said: "And, besides, by the time the commissioners of the respective governments are prepared to commence their labors at that point, that line will probably have been determined and marked by the United
*66 States surveyors, Messrs. Jones and Brown, who * are now engaged upon the surveys of certain boundaries in the Choctaw and Chickasaw country, under the provisions of the treaty of January 22, 1855. . . . The above named surveyors are provided with a competent astronomer and excellent instruments, and their line will probably require but simple verification on the part of the joint commission; and for all purposes appertaining to the interests of the citizens of Texas along and adjacent to the proposed boundary line north of the Red River, Brown and Jones' survey must prove sufficient and satisfactory."

For reasons that need not be here detailed, the commissioners of the two governments separated before their joint work was concluded. The commissioner of the United States in a preliminary report, November 14, 1860, to the Secretary of the Interior, stated that he commenced his survey by tracing the 100th meridian from its intersection with the Canadian River northward to its intersection with the parallel 36° 30′, forming the northeast corner of the boundary. Having traced and marked that parallel to the northwest corner, he returned along the bed of the Canadian River, and came again to the 100th meridian, when he turned southward, and followed that meridian "to its intersection with the south [Prairie Dog Town] or main branch of Red River." In a subsequent report to the Commissioner of the Land Office, under date of September 30, 1861 he said: "That part of the 100th meridian lying between the main branch of Red River"—by which was meant Prairie Dog Town Fork or South Fork—"and the southern boundary of the *Cherokee* country had been determined, run and marked by Messrs. Jones and Brown in 1859, under the direction of the Indian Bureau, as constituting the boundary between Texas and a part of the Indian Territory. So much of the boundary line as was thus established, Hon. Jacob Thompson, then Secretary of the Interior, directed me to adopt, and in pursuance of this instruction I simply retraced the meridian up to where the work of Messrs. Jones and Brown ended. Thence I prolonged it up to its intersection with the parallel 36° 30′."

*67 It should be here stated that the governor of Texas, under * date of April 28, 1860, instructed the commissioner appointed by him to "insist upon the North Fork as the main Rio Roxo or Red River, and as the true boundary line, as described in the treaty of 1819." And just before that date, namely, on the 8th day of February, 1860, when there was no reason to suppose that the United States acquiesced in the claim of Texas, the legislature of that State passed the act heretofore referred to, creating the county of Greer with the following boundary: "Beginning at the confluence of Red River and Prairie Dog River,

thence running up Red River, passing the mouth of South Fork and following Main or North Red River to its intersection with the 23d degree of west longitude; thence due south across Salt Fork and to Prairie Dog River, and thence following that river to the place of beginning." 2 Sayles' Early Laws of Texas, Art. 2886. Of course, the purpose of that enactment was to assert, in solemn form, the claim of the State to the territory in dispute.

During the Civil War, and for many years thereafter, this vexed question did not receive any attention from either government. The reason for this will be understood by every one.

But the fact upon which the State seems to lay most stress is, that on the 24th day of February, 1879, Congress passed an act entitled "An act to create the Northern Judicial District of the State of Texas, and to change the Eastern and western Judicial Districts of said State, and to fix the time and place of holding courts in said Districts." 20 Stat. 318, c. 97. By the first section of that act it was provided "that a judicial district is hereby created in the State of Texas, to be called the Northern Judicial District of said State, and the territory embraced in the following named counties, as now constituted, shall compose said district, namely." Here follows a list of one hundred and ten counties, including all the recognized counties of Texas (except Red River and Bowie) that are immediately south of the line between the Indian Territory and Texas, as that line is defined on the above map of 1892; and midway in this long list appears the word "Greer."

*68 The learned counsel representing the State insist with confidence * that this act of Congress should be regarded as an expression of a purpose by the United States to surrender its claim to the territory in dispute, and as a recognition that that territory was a part of Texas. But we cannot so construe it without doing violence to the strong conviction we have that Congress did not, for a moment, intend by this legislation to part with extensive territorial possessions which the General Government had during a long period claimed to be under its exclusive jurisdiction, and outside of the jurisdiction of any State. We have been unable to find in the history of the act of 1879 any intimation or suggestion that the placing of the territory in dispute in the Northern Judicial District of Texas was made for the purpose of finally determining the controversy as to boundary that had long existed between the United States and Texas. It was entirely competent for Congress for judicial purposes to have included the whole or any part of the Indian Territory within a judicial district established in an adjoining State. If Congress was aware of the state enactment of 1860, the county of Greer might well have been referred to as a county then "constituted," and to be placed, for judicial purposes, within the Northern Judicial District of the State of Texas. Thus the act of 1879 may not unreasonably be interpreted; and we think that any other construction of its provisions would impute an intention of Congress to dispose of an important part of the territory of the United States without disclosing such intention, either by the title of the act passed, or by any words in its body indicating a purpose to settle a disputed question of boundary. The respect due to a coördinate department of the government forbids this court from taking any view of its action that would imply a willingness to accomplish by indirection, or by the use of vague forms of expression, what, perhaps, could not have been accomplished in an open manner, or by employing

such clear, distinct language as the occasion and the interests involved alike demanded.

We are the more inclined to take this view because it is manifest that, prior to the present litigation, the State of Texas never regarded the act of 1879 *69 as recognizing its * jurisdiction over the territory in question, nor supposed that that act placed Greer County, so called, in the Northern Judicial District of Texas for any except judicial purposes.

In the early part of the year 1882, Senator Maxey of Texas, at the instance of the governor of that State, (and in anticipation of like action by the Texas legislature,) introduced into the Senate of the United States a bill providing for the appointment of a commission to consider the unsettled boundary dispute between the United States and Texas. There was no pretence that the matter had been disposed of by the act of 1879. That bill passed the Senate, but did not pass the House of Representatives. In the latter body a bill was introduced by a Representative from Texas which defined the boundary between the Indian Territory and Texas as follows: "Beginning at the southeast corner of said Indian Territory, in the middle of Red River; thence up said river to the junction of the Prairie Dog Town and North Forks of said river; thence up the middle of said North Fork to the 100th meridian west from London; thence crossing said North Fork by a line due north to the northeast corner of said State of Texas, as now established." The Judiciary Committee reported adversely to this bill, and, as a substitute for it, reported a joint resolution providing for the appointment of a joint commission to ascertain and mark the point where the 100th meridian crosses Red River, in acordance with the treaty of 1819. House Report No. 1282, 47th Cong. 1st Session. The report of that committee *70 will be found in the margin.[1] It contains * a full statement of the views entertained by that committee in opposition to the claim of the State.

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[1] *The Committee on the Judiciary, by Mr. Willits, to whom was referred the bill (H. R. 1715) to define the boundary between the Indian Territory and the State of Texas, begs leave to report:*

That said bill seeks by legislative enactment to define said boundary at the point in dispute, as the North Fork of the Red River, instead of the South Fork, commonly called the Prairie Dog Town Fork of the Red River.

The importance of the issue involved may be seen at a glance, when it is observed that the tract in dispute, lying within said two forks of Red River, and bounded on the west by the one hundredth meridian of longitude west of Greenwich, is about 60 miles long and 40 miles wide, probably over 2,000 square miles, and containing a large amount of valuable land. If this tract is a part of Texas, the lands belong to that State under the act of her admission, while if it is a part of the area of the Indian Territory it becomes a portion of the public domain.

The real question in dispute is which branch or fork of Red River is its main branch, or the continuation of the river. The initial point of investigation is the treaty between the United States and Spain, dated February 22, 1819, in which this part of the boundary is defined as follows: After it strikes the Rio Roxo of Natchitoches or Red River," it then follows "the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing said Red River and running thence by a line due north to the Arkansas, etc. . . . the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818."

By this it will be seen that the western boundary of that portion of the United States lying on the north of the Red River was said one hundredth meridian, and that its southwestern corner was where said meridian crosses the river. At the date of that treaty this region had never been accurately explored, and the fact was not known that Red River divided into two branches before it reached said meridian; in fact, the very map referred to in the treaty makes the river a continuous stream, and does not lay down the North Fork at all. Subsequent surveys have discovered the two forks, and have definitely located said one hundredth meridian about 80 miles west of where the two forks form the river

*71 In the same year the State of Texas, by an act approved * May 2, 1882, authorized and empowered its governor "to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appointed *72 by, or on * behalf of, the United States, for the same purpose, shall run and mark the boundary line between the Territories of the United States and the State of Texas as follows: Beginning at a point where a line drawn north from the intersection of the thirty-second degree of north latitude with the western bank of the Sabine River crosses Red River, and thence following the course of said river westwardly to the degree of longitude one hundred west from London, and twenty-three degrees west from Washington, as said line was laid down in Melish's map of the United States, published at Philadelphia, im- *73 proved to the first of January, 1818, and designated * in the treaty between the UnitedStates and Spain, made February 22, 1819. § 2. Said joint commission will report their survey, made in accordance with the foregoing section of this act, together with all necessary notes, maps and other papers, in order that in fixing that part of the boundary between the Territories of the United States and the State of Texas the question may be definitely settled as to the true location of

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proper. The treaty with Mexico dated January 12, 1828, recognizes the boundary as stipulated in the aforesaid treaty with Spain, as did the joint resolution admitting Texas into the Union. Even at as late a date as her admission into the Union there was no knowledge of uncertainty in this boundary. Lieutenant Emory made a map for the War Department in 1844 (which is now in the Land Office), on which the North Fork is not laid down, and on that Red River traces nearly the course of the Prairie Dog Town Fork. Disturnell's map of Mexico, dated 1848, follows in this regard Emory's and Melish's maps.

The first accurate knowledge of these streams seems to have been obtained by Captain R. B. Marcy and Captain George B. McClellan, who, under the direction of the War Department, explored the headwaters of the Red River in 1852, and made an elaborate report, which was published under the authority of Congress. (See Ex. Doc. Senate, No. 54, Thirty-second Congress, Second Session.)

Even this report did not develop the data for this dispute, as Captain McClellan, doubtless from the inaccuracy of his instruments, located said one hundredth meridian below the fork of the river several miles, over one degree of longitude east of its actual location.

The question does not seem to have arisen until after the astronomical survey of said meridian by Messrs. Jones and Brown in 1857 to 1859, in pursuance of a contract between them and the Commissioner of Indian Affairs, who wished to know the boundary line between the Choctaw and Chickasaw country. They located the one hundredth meridian, as before stated, some 80 miles west of the junction of the two forks, and they designated the Prairie Dog Town branch as the main branch of the Red River.

It appears that this designation was at once questioned by Texas, and, at the instigation of the Senators of that State, Congress passed an act, approved June 5, 1858, 11 U. S. Stat. 319, authorizing the President in conjunction with the State of Texas to run and mark said boundary line. Commissioners were appointed on the part of the United States and of Texas, who proceeded to their work in May and June, 1860.

Governor Sam Houston of Texas instructed the commissioner of that State as follows:

"In the prosecution, then, of the survey you will be guided by Melish's map, and insist upon the North Fork as the main Rio Roxo or Red River, and as the true boundary line, as described in the treaty of 1819."

He refers in his letters of instructions to the Marcy survey, and claims that Marcy was clearly of the opinion that the North Fork was the true Rio Roxo, or Red River proper, and further claims that said map of Melish's lays downs the North Fork as the main prong.

The commissioners were unable to agree, the one on the part of the United States claiming that at and across the Red River and to a point about half way from the North Fork to the Canadian River the line had been definitely located by Messrs. Jones and Brown the year before, and that nothing now remained but to extend the line north to latitude 36° 30′, its northern extremity. To this the commissioner on the part of Texas objected, and the latter proceeded south to the North Fork, and placed a monument thereon on the north bank fifteen feet in diameter and seven feet high, claiming that as the true southwest corner of Indian Territory, and reported his doings to the governor of Texas. The commissioner on the part of the United States seems never to have completed his report.

the one hundredth degree of longitude west from London, and whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red *74 River designated in the treaty between the United States and Spain * made February 22, 1819; and in locating said line said commissioners shall be guided by actual surveys and measurements, together with such well established marks, natural and artificial, as may be found, and such well authenticated maps as may throw light upon the subject. § 3. Such commissioner or commissioners, on the part of Texas, shall attempt to have said survey, herein provided for by the joint commission, made and performed between the first day of July and the first day of October of the year in which said survey is made, when the ordinary stage of water in each fork of said Red River may be observed; and when the main or principal Red River is ascertained as agreed upon in said treaty of 1819, and the point is fully designated where the one hundredth degree of longitude west from London, and twenty-third degree of longitude west from Washington, crosses said Red River, the same shall be plainly marked and defined as a corner in said boundary, and said commissioner shall establish such other permanent monuments as may be necessary to mark their work." Gen. Laws, Texas, 1882, p. 5.

In the year 1884 the attention of the Secretary of the Interior was called to the attempted occupation of a part of the territory in dispute by white settlers, who assumed that it was a part of the State of Texas. That officer called the

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Texas adopted and acted upon the report of her commissioner as settling the question of boundary, and established the territory in dispute as a county of that State, naming it Greer, and has assumed jurisdiction over it; and by an inadvertence, not singular in our legislative history, the United States by act of Congress approved February 24, 1879, 20 U. S. Stat. 318, included said county of Greer as a part of Texas in the Northern Judicial District of that State, not annexing it for judicial purposes, but recognizing it apparently as an integral part of Texas.

It is manifest, therefore, that some means should be taken to settle this dispute as soon as possible. Conflicts are arising between the United States authorities and persons claiming to exercise rights on the disputed tract under the jurisdiction of the State of Texas; bloodshed and even death has resulted from this conflict. As long ago as May, 1877, the attention of the Secretary of the Interior was called to the dispute by the War Department, and the Secretary of the Interior replied to the letter of inquiry under date of May 10, 1877, which letter we add as part of this report.

On a careful review of the facts in the case—for the question as to which prong of the river is the true river is really a question of fact—your committee is decidedly of the opinion that the South Fork is the true boundary, and that therefore the claim of the State of Texas is unwarranted.

So far from Captain Marcy being clearly of the opinion, as Governor Houston claimed, that the North Fork is the main branch, his final opinion was in favor of the South Fork. It is true that in his diary, on the day he struck the North Fork, he used the language attributed to him, under the date of May 26, to wit:

"We are now in the immediate vicinity of the Wichita Mountains [a range of mountains lying east by northeast from the mouth of Otter Creek, which empties into the North Fork, and where he was encamped]. Red River, which passes directly through the western extremity of the chain, is different in character at the mouth of Otter Creek from what it is below the junction of the Ke-che-ah-que-ho-no (the Dog Town Fork)."

But he had been for several days traveling along the north bank of the Red River west, and struck the North Fork when it, as well as the South Fork, was swollen with the rains, and both branches he says "were of apparently about equal magnitude," and he naturally spoke of the North Fork as "Red River." But he continued up the North Fork to its source, which he located at longitude 101° 55′. Then he took a southwesterly course till he came to the headwaters of the Prairie Dog Town (or South Fork), which he located at longitude 103° 7′ 11″, and from that time he repeatedly speaks of that branch as the main branch. (See his report, pp. 55, 58, 84, 86, and 87.) He also entitles his Plate No. 10, which is a picture of the rock and gorge out of which the headspring of that fork flows,

attention of the Secretary of War to the subject, and suggested that as this territory had been included within the limits of the Indian Territory, and treated as part thereof for many years, the military should protect the interests of the United States. President Arthur issued his proclamation, warning all persons from obtruding upon the lands embraced within the limits of the Indian Territory. At the request of the authorities of Texas action was suspended to await the determination of the disputed question of boundary between that State and the United States.

At the next session of Congress the joint resolutions reported at the previous session were embodied in the act of January 31, 1885, c. 47. That act provided:

"Whereas the treaty between the United States and Spain, executed
*75 February twenty-second, eighteen hundred and nineteen, * fixed the boundary line between the two countries west of the Mississippi River as follows: Beginning on the Gulf of Mexico at the mouth of the Sabine River, in the sea, and continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; thence following the course of the Rio Roxo westward to the one hundredth degree of longitude west from London, and the twenty-third from Washington; thence crossing the said Red River and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source, in latitude forty-two degrees north; and thence by that parallel of latitude to the South Sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, eighteen hundred and eighteen; and whereas a controversy exists between the United States and Texas as to the point where the one hundredth degree of longitude crosses the Red River, as described in the treaty; and whereas the point of crossing has never been ascertained and fixed by any authority competent to bind the United States and Texas; and whereas it is desirable that a settlement of this controversy should be had,

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as "Head Ke-che-ah-que-ho-no, or the main branch of the Red River." It is manifest that, whatever may have been his first impressions, he finally came to the conclusion, both from its greater length and size, that the South Fork is the main branch.

A reference to the letter of the Commissioner of the Land Office, hereto annexed, will show that Messrs. Brown and Jones had no doubt of the south being the main branch. The reasons they give seem to be conclusive. The width of the South Fork at the one hundredth meridian is 76 chains and 85 links; that of the North Fork 23 chains. The field-notes of the commissioner on the part of the United States, acting under the act of June 5, 1858, of the date of August 29, 1860, say the channel of the North Fork is only 25 chains and 44 feet, and that he found "no water on the surface, (*i. e.*) the river bed, but it is found by digging 2 feet 3 inches below the surface." While in his field-notes of August 30, he says: "Struck main Red River. Main Red River where crossed, 65 chains and 38 feet; channel of running water, 22 feet 6 inches deep. Plenty of long, large lagoons of water in the bed besides the running channel."

If the data given in these reports are correct there would seem to be no doubt of the claim of the United States to the tract in dispute, and, therefore, your committee report adversely to the bill referred to it.

But, inasmuch as the claim is disputed, and that with the earnestness of belief on the part of Texas, and inasmuch as none of the surveys referred to have been made with the privity of the State of Texas, the joint commission appointed having failed to act in concert, your committee are of the opinion that that State should have a hearing in the matter, and should have an opportunity to coöperate with the United States in settling the facts upon which the question in dispute rests. A substitute is reported for the appointment of a joint commission, the passage of which is recommended.

to the end that the question of boundary, now in dispute because of a difference of opinion as to said crossing, may also be settled; therefore,

"*Be it enacted, etc.*, That the President of the United States be, and he is hereby, authorized to detail one or more officers of the army who, in conjunction with such person or persons as may be appointed by the State of Texas, shall ascertain and mark the point where the one hundredth meridian of longitude crosses Red River, in accordance with the terms of the treaty aforesaid, and the person or persons appointed by virtue of this act shall make report of his or their action in the premises to the Secretary of the Interior, who shall transmit the same to Congress at the next session thereof after such report may be made, for action by Congress." 23 Stat. 296, 297.

*76 * Under the act of Texas of 1882 and the act of Congress of 1885, the two governments appointed commissioners, but they were unable to agree upon the vital point as to whether the line which by the treaty was to follow the course of Red River westward to the 100th meridian went up the North Fork of Red River until that meridian was reached, or went westward along the Prairie Dog Town Fork to the point designated by the survey of Jones and Brown.

On the 30th day of December, 1887, President Cleveland issued a proclamation asserting that title in, and jurisdiction over, all the territory lying between the North and South Forks of the Red River and the 100th meridian, as part of the Indian Territory, was vested in the United States. That proclamation recites the fact that the commissioners appointed on the part of the United States, under the act of January 31, 1885, authorizing the appointment of a commission to run and mark the boundary lines between a portion of the Indian Territory and the State of Texas, in connection with a similar commission to be appointed by the State of Texas, had, by their report, determined that the South or Prairie Dog Town Fork was the true Red River designated in the treaty, the commissioners appointed on the part of said State refusing to concur in that report. The president admonished and warned all persons, whether claiming to act as officers of the county of Greer, in the State of Texas, or otherwise, against selling or disposing of or attempting to sell or dispose of any of said lands, or from exercising or attempting to exercise any authority over said lands, or purchasing any part of said territory from any person or persons whatsoever.

We have referred, with perhaps more fullness than was necessary, to the action, legislative and otherwise, of the two governments after the passage of the act of 1879, for the purpose of showing that, notwithstanding the passage of that act, the United States continuously asserted its rightful jurisdiction over the territory in dispute as a part of what is commonly called the Indian Territory; and that, finally, as the only peaceful method of ending the dispute, Congress passed the act of 1890, under the authority of which the present suit was instituted.

*77 * In addition to what has been stated, we may add that the governor of Texas, in his message to the legislature of January 10, 1883, enforced the claim of his State by an exhaustive argument, covering the whole field of controversy, but without intimating that the United States, by the act of 1879 creating the Northern Judicial District of Texas, had admitted that "Greer County" was rightfully a part of Texas and subject to its jurisdiction. No one can read that message without perceiving that the author was familiar with every phase of this

question of boundary. It did not occur to him that the question had been concluded by the act of Congress establishing a judicial district in the State of Texas. If he had so interpreted that act, a reference to it would have been made in the course of his presentation of the matter on behalf of his State.

In our judgment the act of Congress of 1879, establishing the Northern Judicial District in Texas, must be interpreted as meaning that the territory in dispute was placed in that district only for such judicial purposes as were competent to the courts of the United States, holden in that district, and that Texas can take nothing in the present controversy by reason of its provisions.

In support of the contention that the United States is estopped by its action to claim the territory in dispute, the answer alleges that "the Executive Department of the government of the United States has established and maintained post offices and post roads in said county, has advertised publicly for bids for carrying the United States mails over the routes in said county, designating, as defendant is advised, said post offices and post roads as lying in Greer County, Texas, and not lying in the territory allotted to the Indians." In the amended bill filed by the United States it is alleged that, in 1886, after the passage of the act of 1885 providing for a commissioner to ascertain the line between Texas and the United States, as established by the treaty of 1819, and while the commissioners appointed under that act were actually engaged in their duties, certain residents of the disputed territory, describing themselves as residents of
*78 Greer County, * Texas, petitioned the Post Office Department of the United States for the establishment of post offices respectively at Mangum and Frazier, in Greer County, Texas; that in that year the prayers of the petitions were granted; that acting upon the designation of locality as set forth in such petitions such post offices were established and designated as in Greer County, Texas; but "during the same year 1886, and on the 27th day of December in said year, it was discovered by the authorities of the Post Office Department that said post offices were located in the territory in dispute; that said territory was claimed by the United States; that it was designated and outlined on the maps of the General Land Office and of the Post Office Department as not within the limits of the State of Texas, but a part of the Indian Territory of the United States; that thereupon, on the last mentioned day, in order to correct the error, the designations of those post offices were changed so as to locate them within the Indian Territory, and they have been from that date and are still only known, recognized and described in orders and official acts of the Post Office Department as located in the Indian Territory; and that all other post offices established within that territory since December, 1886, have been established, recognized and described, and are still so described and recognized, as within the Indian Territory."

It is quite sufficient to say in respect to this point that the evidence fully sustains the allegations of the amended bill, and, therefore, the designation, for a short time, of the post office referred to as being in Greer County in the State of Texas cannot, under the circumstances, be deemed of any weight in our determination of the main issue.

There is another view of the case upon which the State relies, to which much of the argument of counsel was directed. It is indicated in the following clauses of the answer filed by the State: "That in accordance with their usual custom the Spanish conquerors upon taking possession of Natchitoches and the

territory lying on or adjacent to 'Rio Roxo,' established and laid out a road or route between Santa Fé, in New Mexico, and Natchitoches, now in the State
*79 of Louisiana, for * the uses of commerce between said places, which road or route traversed the country west and northwest of Natchitoches, along the south bank of said 'Rio Roxo,' to a point now in —— County, Texas, then crossed said stream to its north bank, and thence along said north bank to the source of what complainant now styles the 'North Fork of Red River,' and thence to Santa Fé. That this road was for many years frequently travelled by merchants, traders, trappers, explorers and other persons trading or travelling between said points of Santa Fé and Natchitoches, and at the date of said treaty of 1819, 'Rio Roxo of Natchitoches,' from its mouth to its source, was well known to the Spaniards, as well as to the Indians and trappers of that region of country, as the stream now called Red River, having its source near the source of the Canadian River, southeast of and near to Santa Fé, in the now Territory of New Mexico; thence running in an eastern or southeastern direction, receiving in its course at intervals the waters of the False Wachita River, the Kecheahquehono or 'Prairie Dog Town River,' Pease River, Little and Big Wichita Rivers, and divers other streams, and emptying its waters into the Mississippi River, above New Orleans, in the State of Louisiana. At the date of said treaty of 1819 there was only one 'Rio Roxo of Natchitoches' known to geographers or to the people who inhabited the locality of the territory in controversy, and that was the river above described."

In a former part of this opinion we endeavored to show from early maps and printed publications that, at the date of the treaty of 1819, it was believed that the Rio Roxo of Natchitoches or Red River extended without any break from is source not far distant from Santa Fé, first southeasterly, then eastwardly, and then southeastwardly to a point near the Mississippi River. We have here in the answer filed by the State an admission that such was the fact, its position, as we have seen, being that the river that connected the country near Santa Fé with the country bordering on the Mississippi was what is now called the North Fork of Red River. This contention, the State insists, is supported by evidence of the existence of a road or route established in early times
*80 between * Natchitoches and Santa Fé, and which passed along that fork.

It is to be observed that this road or trail is not marked upon what is called the treaty map of 1818, nor upon any map that preceded it. Looking at the diplomatic correspondence that resulted in the treaty of 1819, and at the map which was before the negotiators, we find nothing to show that the existence or non-existence of a road or trail between Natchitoches and Santa Fé was an important factor in determining the boundary between the United States and Spain. So far as the record discloses, the negotiators had no knowledge of such a road or trail; and there is no substantial ground upon which to rest even a conjecture that the line was fixed with any reference to routes or trails traversed by traders and trappers. The negotiators had in mind rivers and degrees of latitude and longitude, and that fact appears on the face of the treaty. It cannot be known that they were controlled in any degree by information as to routes across the country used by traders or explorers.

Looking at maps published after the treaty was made, we find that a "great Spanish road to Red River" is marked on the Carey & Lea atlas of 1822. Leaving Santa Fé it extends in a southeasterly and easterly direction on the north side

of the Canadian River to about 101° 30′ of west longitude, then across that river in a southeasterly direction, crossing the False Wachita east of the one hundredth meridian, then passing southeastwardly and north of a stream which is probably the North Fork of Red River, as now known, and then eastwardly and north of Red River until it reaches and crosses Red River just east of the ninety-seventh degree of longitude. The same road is delineated on the Melish map of 1823 and the Young-Mitchell map of 1835. According to those maps each of those roads crossed Red River near the mouth of the Wachita, far east of the junction of the North Fork with Red River. If this be the trail that extended from Santa Fé to Natchitoches, or if there was a trail which, in early times, passed along the North Fork of Red River to or in the direction of Santa Fé, (upon which point
*81 the evidence * is by no means clear) we should not necessarily conclude that such trail marked the line established by the treaty, nor that its existence proved that the river near or along which it ran was the main branch of Red River. The direction of the treaty was to follow the course of Red River *westward* to the 100th meridian. As we have seen, the treaty did not refer to any road or trail used by traders or trappers, but only to rivers and degrees of longitude. At the point where the North Fork empties into Red River there is a river which, to say the least, is as large as the North Fork, and which extends *westward*. By following the course of *that stream* to the 100th meridian the terms of the treaty are fully met, while they will not be met by departing from a westward course, before reaching that meridian, and going first in a northerly, then in an easterly, and then in a northwestwardly direction up the North Fork. The location of the line established by the treaty should be determined by the course of rivers and degrees of latitude and longitude, rather than by routes, trails or roads, the extent and character of which cannot be certainly known at this day, and over which, at the date of the treaty and prior thereto, travel by traders and trappers could have been only occasional and limited.

There are other matters to which, in view of the large amount of evidence relating to them, we must advert. Many witnesses were examined upon the question whether the Prairie Dog Town Fork or the North Fork was the longer river, which the broader and deeper stream, and which drained the most territory. The State insists, in this case, that if regard be had to width and depth of stream and extent of country drained, the North Fork must have been deemed, in early times, or when the treaty of 1819 was made, the more important of the two forks of Red River, and, therefore, that that fork should be held to be the river whose course, going from the east, was required by the treaty to be followed westward until the 100th meridian was reached.

These questions were considered by the Boundary Commission appointed after the passage of the act of Congress of January 31, 1885, c. 47. The
*82 commissioners on behalf of the * United States and Texas united in declaring that "in finding the point where the 100th meridian of west longitude crosses Red River, if it should appear that said meridian crosses Red River west of the confluence of what are now known as the North Fork and Prairie Dog Town Fork, then the true boundary should be taken at that one of those streams which best satisfies the provisions of the treaty of 1819." They concurred in holding that of those two streams the Prairie Dog Town Fork was the longer. The commissioners on behalf of the United States voted that the Prairie Dog Town

Fork was the wider stream. In this view the Texas commissioners concurred, with the qualification that that stream was the "wider between the banks, but not in ordinary flow of water." The United States commissioners held that the Prairie Dog Town Fork drained a larger area than the North Fork. In this view the Texas commissioners concurred, with the qualification that "there is little or no rainfall on the sources of the stream, and hence is taken out of the usual rule of estimating the size of rivers, while the North Fork rises in the mountains, where it rains more, and its sources are living streams." House Ex. Doc. No. 21, 50th Cong. 1st Sess. pp. 165 to 168. Touching these matters, the evidence in the present case is very voluminous. Many witnesses, who had apparently equal opportunities of observation, express opinions that are directly conflicting. Governor Roberts, in his message of January 10, 1883, after referring to the disputed question as to which of these two rivers was the main branch of the Red River, said: "I have shown how nearly equal are the claims of each to be called the main branch from facts pertaining to them derived from observation. From this, either one of them, in the absence of the other, would be taken to be the main branch. It may be admitted that the South Fork [Prairie Dog Town Fork] is the larger and longer, and, therefore, the main branch in reference to the two nearly equal branches of Red River, but that admission does not settle the fact that the line must run up that branch." The true question, he said, was "which one of the two nearly equal branches corresponds most
*83 nearly with the 'Red River of Natchitoches or Red River,' as it was * known in 1819, when the treaty was made, and as 'laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818."

We have found that the 100th meridian mentioned in the treaty must, especially since the Compromise Act of 1850, be taken to be the 100th meridian astronomically located. And we are now further considering whether the two governments intended the line, running from the east to the west, should leave Red River at the mouth of what is now known as the North Fork, and go northwardly and northwestwardly up that fork, or should go westwardly up what is now known as the Prairie Dog Town or South Fork. So far as this question depends upon evidence as to the relative width and length of these two rivers, and the extent of country drained by each, we are of opinion that, although a large number of witnesses sustain the position taken by the State, the Prairie Dog Town or South Fork, according to the decided weight of evidence, is wider and longer, and drains a much greater extent of territory than the North Fork. This is the conclusion reached by the court after a careful and patient scrutiny of all the proof. So that the evidence of living witnesses corroborates that furnished by maps, and sustains the position taken by the United States as to the scope and effect of the words in the treaty of 1819, "following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington."

But suppose the evidence left it in doubt as to which was the wider and longer stream, and which of the two drains the largest extent of territory; and let it be assumed, as suggested by Governor Roberts, that upon the facts, derived from observation, the claims of each river to be the main branch of the Red River mentioned in the treaty are nearly equal; what, in such a contingency, is

our duty? It is to ascertain which river more nearly meets the requirement that the line from the east to the west must follow "the course of the Rio Roxo *westward* to the degree of longitude 100 west from London." If, in following the course of Red River *westward* it be found that that river forks before
*84 the 100th meridian of longitude * is reached—one of the forks coming from the north and northwest, and the other from the west—it would seem to be our duty to hold that the river coming from a westward direction was the one whose course the treaty directed to be followed. Those who insist that the course should be *north and northwestwardly* for any material distance from the main river to the 100th meridian, are under an obligation to sustain that position by such evidence as would justify the court in departing from the plain direction of the treaty to follow the Red River "westward" to the named meridian. But that has not been done.

Much stress has been laid by the State upon the testimony of the late General Marcy given before the Boundary Commission of 1886. In the year 1852 that officer, being then a captain in the United States Army, was directed by General Scott to make an examination of the Red River and the country bordering upon it from the mouth of Cache Creek to its source. During his explorations he camped, on the 30th of May, 1852, at a certain point on Red River, and in his daily journal of his movements said: "Red River at this place is a broad, shallow stream, six hundred and fifty yards wide, running over a bed of sand. Its course is nearly due west to the forks, and thence the course of the south branch is W. N. W. for eight miles, when it turns to nearly N. W. The two branches are apparently of about equal magnitude, and between them, at the confluence, is a very high bluff, which can be seen for a long distance around." Senate Ex. Doc. No. 54, 32d Cong. 2d Sess. p. 20. We take it that, in his reference to the forks of Red River, he had in mind the Prairie Dog Town Fork and the North Fork.

Thirty-two years later, that is, in 1886, Captain, then General, Marcy appeared as a witness before the Boundary Commission. He referred to his report of 1852, and said: "As the time that has elapsed since I made that exploration (thirty-three years) is so great, many of the facts and events connected therewith have passed from my memory; but some matters relative to the objects for which this commission was convened, as I understand, may not be found
*85 in the report. * I have this morning, for the first time, seen a copy of that portion of Melish's map of the United States, embracing the part of the Red River country which the commission has under consideration at this time, which is authenticated by the signature of the Secretary of State of the United States. Upon this map only one large fork of Red River is delineated, with one more northerly small affluent, which is not named, but may have been intended for Washita River or Cache Creek." House Ex. Doc. No. 21, p. 59.

That the full force of General Marcy's statements may appear we here give so much of his deposition as is embodied in the brief filed by counsel for the State:

"I regarded the Prairie Dog Town branch as the main Red River, for the reason that its bed was much wider than that of the North Fork, although the water only covered a small portion of its bed, and as the sandy earth absorbed a good deal of water after it debouched from the cañon through which it flows,

it may not contribute any more water to the lower river than the North Fork. The Prairie Dog Town branch and the North Fork of Red River, from their confluence to their sources, are of about equal length—the former being 180 miles and the latter 170 miles in length. For reasons which I will presently state, I have been unable to resist the force of my own convictions, that the branch of Red River that I called the North Fork of that stream was what is designated upon Melish's map as Rio Roxo. I doubt if the Prairie Dog Town River was ever known to civilized men prior to my exploration in 1852; and, if it was ever mapped before then, I am not aware of it. The character of the country through which this stream flows is such that travellers would not have been likely to pass over it when there was a much more favorable route north of the North Fork. The water in the Prairie Dog Town branch, from its confluence with the North Fork to within two miles of its head spring (about 100 miles), I found so bitter and unpalatable that many of the men became sick from drinking it. But one pool of fresh water was found throughout the entire distance, and the In-
*86 dians told me they never went up this stream * with their families if it could be avoided, for the reason that the nauseous water frequently proved fatal to their children. Hence, it is not surprising that but little, if anything, should have been known of this repulsive region before my exploration in 1852. And this probably accounts for the entire absence of most of its southern branches upon Melish's map. It is very certain that the 'Prairie Dog Town River' was never delineated by any Spanish, French or English name, as were most of the other streams in that country, and it was only known to the Indians, and possibly to some Mexican traders, as 'Kecheahquehono,' a Comanche appellation, the signification of which the Delawares informed me was 'Prairie Dog Town River.' . . . As before stated, owing to the absence of good water, the sandy character of the soil along the river, and the formidable obstruction presented by the elevated and staked plain, and the extensive belt of gypsum crossing this route, the Mexicans would never have attempted to traverse it with their carts in their trading expeditions from Santa Fé to Natchitoches, especially when there was so good a route a little further north, possessing all the requirements for prairie travelling. The Rio Roxo upon Melish's map is almost entirely south and west of the Wichita Mountains, but in close proximity to them—which is in accord with my determination of the position of the North Fork, while there are no mountains upon the Prairie Dog Town branch. The head of the Rio Roxo upon Melish's map is put down as in about latitude 37°, while upon my map the true latitude is 35½°, while the Prairie Dog Town rises in about thirty-four and one-half degrees; so that, if his Rio Roxo was intended to represent the 'Prairie Dog Town River,' it would be two and one-half degrees of latitude too far north." House Ex. Doc. No. 21, pp. 59, 60.

It thus appears that at the time (1852) General Marcy made his exploration of the Red River country he regarded the Prairie Dog Town River as the main Red River, and his conclusion then formed by actual observation was in harmony with the maps that had been previously given to the public. After many of the
*87 facts connected with the subject had, as he * frankly admitted, passed from his memory, he expressed the opinion that the river that he had called the North Fork of Red River was what was designated on Melish's map of 1818 as Rio Roxo. However persuasive his reasons, for that conclusion might be regarded,

if the facts then stated by him were alone taken into consideration, they do not satisfy us that he was in error when, the facts being fresh in his mind, he expressed the opinion, from personal examination on the ground, that Prairie Dog Town Fork was the main Red River. One of the reasons assigned, in support of his last view of this question, is that Prairie Dog Town River was never delineated upon any map of this country or of Europe prior to his exploration, and that it was only known to the Indians, and possibly to some Mexican traders, as the Kecheahquehono, which means Prairie Dog Town River. Now it is quite true that no map, prior to 1852, *marked* any river *as Prairie Dog Town River,* or as the Kecheahquehono. But it is shown, beyond all question, that on all the maps above referred to which appeared after 1819 and down to the time when General Marcy testified before the Boundary Commission, a river was marked whose course (going from east to west) is substantially westward from the point where the line from the Sabine River meets the 32d degree of latitude to the 100th meridian, and that the line, thus delineated, extending to and westwardly beyond the true 100th meridian, is the southern boundary of the Indian *Territory, as that boundary is claimed by the United States.* Between the mouth of the North Fork and the initial monument established by the government in 1856, there is a river whose course is substantially east and west. *That river* is *marked* on Long's map of 1822 and the Melish map of 1823, west of the 100th meridian, as "Rio Roxo or Red River;" on Finley's map of 1826 as "R. Roxo or Red R.;" on the Young-Mitchell map of 1835, and Maillard's map of 1841 as "Rio Roxo or Red River of Louisiana;" and on Mitchell's map of 1851 as "Red River." On all the other maps the same river is plainly delineated. That the name of Prairie Dog Town Fork does not appear on the maps published prior to 1852, or that that name was not known to civilized people until after the explora-
*88 tions * made by Captain Marcy, is not therefore a circumstance of serious moment, certainly not conclusive. The river itself, though unnamed on any map prior to 1852, was in fact delineated on maps for more than a quarter of a century before that officer entered the Red River country with his company.

The character of the country through which the Prairie Dog Town River flowed and the bad quality of its water for drinking purposes, are also referred to by General Marcy as reasons why the North Fork should be regarded as the stream whose course was intended to be followed in establishing the boundary. We do not think that the evidence upon this point is entitled to very great weight. There is no reason to suppose that the negotiators of the treaty had any knowledge or information as to the relative qualities for drinking purposes of the waters of the two streams in question; and if they had, it is difficult to perceive why such facts would control the determination of a disputed question of boundary between two nations. The negotiators knew or believed that there was a Red River, whose source was not far from Sante Fé, and which, in its course, passed Natchitoches. Their purpose was to establish a line which would extend from the point where the line due north from Sabine River met Red River, thence along and up Red River "westward" to the 100th meridian of longitude, then due north to the Arkansas River. The reference in the treaty was to rivers and degrees of longitude and latitude. It was a question of territory without regard to a special trail, the location of which might have been affected by the quality of the waters of any particular stream.

Much significance is attached by the State to the fact that as early as 1860, by legislative enactment, it created the county of Greer with boundaries that include the whole of the territory in dispute, and that it has ever since asserted its jurisdiction over both that territory and the people who inhabit it. However important such facts might under some circumstances be deemed, it must be remembered that during the whole of the period referred to the constituted authorities of Texas have been aware that the United States regarded the territory in dispute as under its exclusive jurisdiction and as a part of what
*89 * is known as the Indian Territory. The government has always disputed the claim of Texas. The only qualification of this broad statement is that suggested by the language inadvertently used in the act of Congress creating the Northern Judicial District of Texas. But that language, we have held, was not intended to express the purpose of the United States to surrender its jurisdiction over the territory in dispute.

It is also said that many titles to land in the disputed territory are held under the State and that much confusion may follow, and injustice be done to individuals, if the claim of the United States be sustained. On the other hand, it is to be inferred that there are many settlers in the disputed territory who assert title to land under the United States. It appears in evidence that in 1873 and 1874 a part of that territory was sectionized under the authority of the General Government. We suppose that Governor Roberts referred to that fact when, in his message of 1883, he said that "the authorities of the United States had established an initial corner on the South Fork of Red River, on the line claimed to be the 100th degree of longtiude, had sectionized the country east of that line, and protected it from settlement of white people as a part of the Indian Territory." He further said: "Application was made to me to know if I would sign the patents, if certificates were located and surveyed in Greer County. Under the then existing circumstances I felt it to be my duty to discourage such locations, as they might be to our prejudice in the settlement of our claim with the United States, when the merits of it could be more fully ascertained." But whatever may be the facts bearing upon this point, our duty is to determine the present issues according to the settled principles of law, without reference to considerations of inconvenience to individuals residing in the disputed territory. We cannot doubt that the Congress of the United States will do all that justice requires to be done in order to avoid any injury to individuals that ought not to be inflicted upon them.

It is further said that the State, since it assumed to create Greer County,
*90 has expended a large amount of money in providing * a public school system for the inhabitants of that locality. To what extent moneys have been so expended is not clearly shown. Whatever may be the facts, touching this point, we do not feel at liberty to give weight to them in this case. The question before us, we repeat, is one of law, and must be determined according to law. What may be fairly and justly demanded by the State, on account of moneys expended for the benefit of the inhabitants of the disputed territory, is a matter for the consideration of the legislative branch of the National Government.

In the argument it was suggested that this court ought not to forget how much was added to the power and wealth of this nation when Texas, with its imperial domain, came into the Union, and her people became a part of the

political community for whom the Constitution of the United States was ordained and established. This fact cannot, of course, be forgotten by any American who takes pride in the prestige and greatness of the Republic. But the considerations which it suggests cannot affect the decision of legal questions, and must be addressed to another branch of the Government. The supposition is not to be indulged that that department of the Government will fail to recognize any duty imposed upon it by the circumstances arising out of this vexed controversy.

For the reasons stated the United States is entitled to the relief asked. And this court now renders the following decree:

This cause having been submitted upon the pleadings, proofs and exhibits, and the court being fully advised, it is ordered, adjudged and decreed that the territory east of the 100*th meridian of longitude, west and south of the river now known as the North Fork of Red River, and north of a line following westward, as prescribed by the treaty of* 1819 *between the United States and Spain, the course, and along the south bank, both of Red River and of the river now known as the Prairie Dog Town Fork or South Fork of Red River until such line meets the* 100*th*
*91 *meridian of longitude—which territory is sometimes * called Greer County —constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America. Each party will pay its own costs.*

Mr. Justice Peckham, not having been a member of the court when this case was argued, took no part in the decision.

State of Indiana v. State of Kentucky.

Supreme Court of the United States, 1896.

[163 *United States*, 520.]

The report of the commissioners appointed October 21, 1895, 159 U. S. 275, to run the disputed boundary line between Indiana and Kentucky, is confirmed.

THE commissioners appointed on the 21st day of October, 1895, 159 U. S. 275, to run the disputed boundary line between the States of Indiana and of Kentucky, reported as stated below. The State of Kentucky filed exceptions to the report. The State of Indiana moved to confirm it.

Mr. William A. Ketcham, Attorney General of the State of Indiana, for the motion.

Mr. Richard H. Cunningham opposing.

MR. CHIEF JUSTICE FULLER announced the decree of the court.

This cause came on to be heard on the report of Gustavus V. Menzies,
*521 Gaston M. Alves and Amos Stickney, commissioners * appointed herein at this term, on October 21, 1895, to ascertain and run the boundary line between the States of Kentucky and Indiana, as designated in the opinion of this court heretofore filed and judgment and decree heretofore entered herein, May 19, 1890, filed April 27, 1896; the exceptions of the State of Kentucky thereto and the motion of the State of Indiana for the confirmation thereof; and which report is as follows:

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1895.

Indiana
vs.
Kentucky.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

The undersigned commissioners appointed by this honorable court in the above entitled cause, to ascertain and run the boundary line between the States of Indiana and Kentucky, north of the tract known as Green River Island, have the honor to present the following report:

The first meeting of the commission was held at Evansville, Indiana, on December 7, 1895, all the commissioners being present, and each commissioner having been sworn according to the order of the court, the commission organized by electing Lieut. Col. Amos Stickney, U. S. army, as chairman.

At this meeting there were present Mr. R. H. Cunningham, of Henderson, Ky., representing the State of Kentucky; Mr. Merril Moores, deputy attorney general of the State of Indiana, representing that State, and Mr. J. E. Williamson,

of Evansville, Indiana, representing a number of land owners along the line where the boundary is to be ascertained and run.

The above mentioned gentlemen being invited thereto, expressed their views in a general way as to a proper method of determining the boundary line to be run between the States of Indiana and Kentucky to accord with the deci-
*522 sion of this court. Neither in the order of your honorable court * appointing the commissioners, nor subsequently, were your commissioners instructed as to the methods they should pursue in ascertaining the boundary line to be run. They therefore assumed that it was the intention of the court to leave them untrammelled with instructions other than such as were to be inferred, first, from the decision of the court, and, second, from the testimony upon which that decision was made.

Your commissioners then proceeded to and made a personal examination of the grounds where the boundary line was to be ascertained and run. After this examination, and a consideration of the subject in the light of the court's decision, and the testimony, it was concluded that a determination of a proper location of the boundary line would require the marking out upon the ground as nearly as possible of the meandered river bank lines of the survey of Jacob Fowler, made in 1805 and 1806, the oldest survey of record, copies of the map and notes of which were incorporated and unchallenged in the testimony in the case.

A competent surveyor was employed in the person of Mr. C. C. Genung, surveyor of Vanderburgh County, Indiana, who was familiar with the county records and the landmarks in the vicinity of the proposed line. Mr. Genung was instructed to proceed as soon as possible under the direction of the chairman to reëstablish upon the ground as nearly as practicable the aforesaid meander line of the survey of 1805 and 1806, using every precaution to determine said line as accurately as might be, from the notes of the survey, and such marks referred to in the notes, and other authenticated marks as might be found.

He was also directed to make cross sections at intervals, by levelling across the depression now existing, where the island chute once was, and determine the present crests of the banks.

Mr. Genung performed the duty allotted to him, and made a map exhibiting the result of his surveys.

Your commissioners, after verifying his work on the ground, then held
*523 another meeting at Evansville, Indiana, January * 22nd, 1896, and made a careful study of the information obtained by the survey. An examination of the map presented by Mr. Genung, giving the results of his survey, with a report upon the same, satisfied your commissioners on three points. The close accord of the reëstablished meander line with the existing crest of the high bank was strong proof that the line as reëstablished was in fact a very close approximation in location to the location of the line as originally run; it also indicated that the original meander line was practically along the crest of the high water bank, and not along the low water line; and further, that the crest of the bank along the Indiana side of the depression as it exists to-day must be nearly as it was at the time of the original survey.

It will be noticed from the topography on the map that the crest of the high water bank on the Indiana side of the depression is quite regular, while the crest of the bank on the island side, especially above the railroad crossing, is irregular,

indicating probably, extensive deposits since the time when there was a free flowing stream around the island. In the testimony there are mentions of drift piles in the upper part of the chute causing deposits.

Below the railroad crossing the crests of the two banks are nearly parallel, and as scaled on the map where most nearly parallel, are about eight chains apart. It would seem probable that the chute before it was choked up by drifts and deposits had a width more or less uniform of about eight chains between crests of the high bank. During low water stages the part of the chute covered by water was probably nearly in the centre of the chute. Just how far the low water surface extended towards the Indiana side, it is impossible at this time to determine accurately, but it would seem that a close approximation to the water line would be a line equi-distant from the Indiana bank crest line and the central line of the chute. Upon this assumption, the water of a low stage would have covered the middle half of the space between the crest of the high banks, and a fair allowance should be made for the space covered by the bank slopes extending from the crests of the high banks to the low water line.

*524 * It was decided then, to lay out as a trial line, a line parallel to the meander line of the survey of 1805 and 1806, as reëstablished, and at a distance of two chains from it, measured toward the island. This was done, and notification was sent to Hon. W. A. Ketcham, attorney general of the State of Indiana; Mr. R. H. Cunningham, representing the State of Kentucky, and Mr. J. E. Williamson representing land owners. The above mentioned gentlemen were invited to present in writing, if they so desired, any statements to prove that such line was not approximately the low water line in the year 1792. They were also invited to make any oral argument relating thereto to your commissioners at their next meeting.

On February 3rd, 1896, your commissioners again met at Evansville, Indiana, and proceeded to inspect the trial line as laid out and marked upon the ground. After their inspection they held a meeting, due notice of which had been given to the aforementioned gentlemen representing the different interests.

Mr. R. H. Cunningham on behalf of the State of Kentucky appeared, and had no particular objections to urge against the approximate line, but filed a request which is herewith transmitted, marked Exhibit "A." Mr. J. E. Williamson sent a communication, which is transmitted with this report and marked Exhibit "B."

After further consideration of the subject it was decided that your commissioners were not authorized to lay down any line beyond the upper and lower limits of Green River Island as it existed in 1792, and it was decided to adopt for recommendation the trial line within those limits as marked, with a slight change at the extreme upper end, to allow for what was undoubtedly a flat bank slope, it being upon a point.

Your commissioners would therefore respectfully state that they have now ascertained and run, according to their best judgment, the boundary line between Indiana and Kentucky, north of the tract known as Green River Island as it existed when Kentucky became a State, which is described as follows, to wit:

*525 * Commencing at a point on the line between sections fifteen (15) and fourteen (14), township seven (7) south, range ten (10) west, and 67.25 chains south of the northeast corner of section fifteen (15). The post set at this

point is witnessed by a sycamore tree 36 inches, S. 1° 55′ E. 43.8 ft.; and also by a honey locust 32 inches, S. 67° 50′ E. 24.1 ft., and is at the head of Green River Island, and also assumed low water mark in 1792. From this point going down stream and making an angle to the left from the east line of section fifteen (15) of 50° 26′, and on a course of N. 49° 16′ W., a distance of 1098.55 ft. to a post witnessed by a cottonwood 48 inches, N. 79° 45′ W. 163 ft.

Angle to right 0° 45′ 15″, course N. 48° 30′ 45″ W. 1171.45 ft. to a post witnessed by a sycamore 22 inches, S. 66° 50′ E. 398 ft.

Angle to left 6° 50′, course N. 55° 20′ 45″ W. 1432.35 ft. to a post, witnessed by a red elm 48 inches, S. 81° 40′ E. 150.5 ft. And also a red elm 60 inches, S. 83° 20′ E. 160 ft.

Angle to left 13° 43′ 15″ course N. 69° 04′ W. 1187.2 ft. to a post, witnessed by a sycamore 41 inches, S. 87° 15′ E. 149.7 ft.; and also a sycamore 48 inches, S. 8° 20′ E. 156.2 ft.

Angle to right 0° 42′ course N. 68° 22′ W. 1312.6 ft. to a post, witnessed by a sycamore 15 inches, south 16° 15′ E. 80.5 ft. And a sycamore 11 inches, S. 18′[°] 00′ E. 79.6 ft.

Thence on same tangent and course 520.55 ft. to a post, witnessed by a cottonwood 16 inches, S. 8° 45′ E. 61.4 ft.

Angle to right 9° 01′ 30″, course N. 59° 20′ 30″ W. 1735 ft. to a post, witnessed by a sycamore 64 inches, N. 13° 40′ W. 130 ft.

Angle to left 2° 37′, course N. 61° 57′ 30″ W. 964.6 ft. to a post, witnessed by a cottonwood 30 inches, S. 44° 00′ W. 67 ft., and a cottonwood 37 inches, S. 34° 40′ W. 70.3 ft.

Angle to right 2° 06′, course N. 59° 51′ 30″ W. 2926.5 ft. to a post, witnessed by a sycamore 48 inches, N. 74° 50′ E. 146.5 ft. and a sycamore 56 inches, N. 27° 30′ E. 94.8 ft., and a stone on section line, between sections eight (8) and nine (9), N. 32° 30′ E. 132.6 ft.

*526 Angle to right 4° 36′ 30″, course N. 55° 15′ W. 1659.6 ft. to * a post, witnessed by a cottonwood 22 inches, S. 17° 15′ W. 141.7 ft.

Angle to right 3° 05′ 30″, course N. 52° 09′ 30″ W. 952 ft. to a post witnessed by a sycamore 60 inches, S. 88° 05′ E. 254 ft., and a sycamore snag 31 inches, N. 49° 25′ E. 164.4 ft.

Angle to right 7° 56′ 30″, course N. 44° 13′ W. 2004.1 ft. to a post, witnessed by an elm 60 inches, N. 2° 35′ E. 230.5 ft.

Angle to right 5° 58′, course N. 38° 15′ W. 477.65 ft. to a post, witnessed by a sycamore 56 inches, N. 29° 45′ E. 115 ft.

Angle to left 0° 40′, course N. 38° 55′ W. 1259 ft. to a post, witnessed by a sycamore 36 inches, S. 44° 55′ E. 131.3 ft., and a cottonwood 40 inches, S. 42° 50′ W. 155 ft.

Angle to right 6° 07′, course N. 32° 58′ W. 1257 ft. to a post, witnessed by an elm 53 inches, S. 43° 25′ E. 578 ft. and the stump of the original maple witness tree of 1806, 65 inches, N. 49° 55′ E. 126 ft.

Angle to right 2° 42′, course N. 30° 06′ W. 1186.6 ft. to a post, witnessed by a sycamore snag 28 inches, N. 69° 15′ E. 102.7 ft.

Angle to right 7° 03′ 30″, course N. 23° 42′ 30″ W. 2735.7 ft. to a post, witnessed by a maple 36 inches, N. 78° 00′ E. 165.3 ft.

Angle to right 12° 17′ 30″, course N. 10° 45′ W. 1202.12 ft. to a post opposite

the lower end of Green River Island, and at low water as it was in 1792, witnessed by a sycamore 52 inches, N. 65° 35′ E. 363.45 ft.

The above courses are run from the true meridian as ascertained by observation at the point on the map marked "W" on the line between townships six (6) and seven (7).

The above described line is indicated by the red line on the map transmitted herewith, marked Exhibit "C." We also transmit the preliminary and final reports of the surveyor, Mr. C. C. Genung, marked Exhibits "D" and "E," also a sheet of cross sections marked Exhibit "F."

The above described line is now marked by cedar posts, set at the initial and terminal points, and points where changes in direction occur, and it is recommended that it should be permanently marked as follows:

*527 * Three suitable points should be selected upon the line, one near the upper end, one near the middle, and one near the lower end. At each of these points a monument should be erected which should consist of a stone of durable quality, six feet long, and eighteen inches square in cross section. This stone should be imbedded in a well made foundation of concrete. The concrete foundation to be six feet square and four feet deep, the upper surface being at the surface of the ground. The stone should be placed upright so as to extend three feet into the concrete, and have three feet above the ground. Upon one side of the stone should be cut the word "Indiana," and upon the opposite side the word "Kentucky." Between the stone monuments, at each turning point of the line, there should be placed an iron post six feet long, and six inches in diameter of cross section. The iron post to be imbedded in a foundation of concrete two feet square and three and one half feet deep; the top of the concrete to be at the surface of the ground, and the post standing upright in the concrete, the top of the post being three feet above the ground.

The estimated cost of the above described monuments, including placing the same, is $600.00.

We herewith file as a part of our report, two certified copies of the original map, which we recommend be furnished the respective States, as may be directed by the court.

We herewith attach an itemized statement of costs and expenses incurred by the commissioners, marked Exhibit "G," which, if approved, we recommend be adjudged equally against the parties to the suit.

Respectfully submitted,

AMOS STICKNEY,
Lt. Col. of Engrs., U. S. A.
GUSTAVUS V. MENZIES,
GASTON M. ALVES,
Commissioners.

*528 * EXHIBIT "A"

Honorable Commissioners of U. S. Supreme Court to ascertain and run the boundary line between Indiana and Kentucky at and near Green River Island.

GENTLEMEN: While I have no special objection to the test line you have tentatively adopted, although it does not seem to make allowance for any accre-

tion to the Indiana bank of the river between June 1st, 1792, and the date of the Congressional survey in 1806, I suggest and request that such line as you may finally adopt be extended upon such course and for such distance as you find correct until it intersects the present low water line of the Ohio River both at the upper and lower ends. In other words that you run at each end to the points where low water mark in 1792 coincides with low water mark at the present time.

Very respectfully,

R. H. CUNNINGHAM,
For the Commonwealth of Kentucky.

February 3d, 1896.

EXHIBIT "B"

EVANSVILLE, IND., Feb. 2, 1896.

COL. AMOS STICKNEY, Evansville, Ind.

DEAR SIR: I was shown a sketch, by Capt. Genung, of the line as staked off. Capt. Genung said to me that he had a letter from you stating that you would be in the city to-morrow, and that the commission would meet to-morrow night. I am compelled to leave home to-night, and will probably not be at home for a day or two. Capt. Genung will explain fully.

The line as staked off in the main will be satisfactory. I desire to call the attention of the commission to the two termini. I understand the controlling fact has been the survey of 1806, and the notes of this survey show that stakes were driven at several points on the bank of the river. If we take the dividing line between sections 14 and 15 as a sample, the notes show that a stake was driven on the bank of the river between the point where the stake was
*529 driven and the * present bank of the river is a very considerable distance, and the evidence shows that a great deal of land has been made by accretion opposite the mouth of Green River. If we take an east and west line, or say the northern boundary line of section 14 and measure off the full length of the east side we have the distance shown by the stake driven. If we were to go one section still further east, a point which nobody has ever claimed was reached by Green River Island, we will have exactly the same thing, a stake on the bank of the Ohio River, and I assume the same notes would show stakes on the Ohio River up to the Ohio line. It does not follow therefore that all the land that has been made south of these stakes is in Kentucky. The same thing holds good at the lower end of the line. Only sixty days ago I passed on an abstract of title for a tract of land belonging to the Smiths immediately down the river from the present site owned by the city for its water works. We commenced on a line back from the river and the calls in the deed were so many feet to the Ohio River, when we measured for the number of feet, we found that it did not reach the Ohio River by one hundred or two hundred feet. I thought at first there was a mistake in the deed, but when we came to ascertain the facts more definitely, it was learned that the difference in feet was accounted for by the accretion. I am confident that the same will hold at many other points along the river. It seems, therefore, to me that we cannot rely on calls of the survey of 1806 to locate the upper and lower ends of the island, as there have been accretions at both points.

Yours respectfully,

J. E. WILLIAMSON.

EXHIBIT "D"

To the Honorable Board of Commissioners of the Indiana and Kentucky Boundary Line at Green River Island.

GENTLEMEN: In accordance with your instructions I have reëstablished the sectional and meander lines of fractional sections, 5, 6, 8, 9, 15, 16 and a part of 14 T. 7 S., R. 10 W., and also a part of section 31, T. 6 S., R. 10 W. following the notes of the original United States surveys as made by Jacob Fowler
*530 * in 1805 and 1806, as closely as possible. I found, however, that his work had not been very carefully nor accurately done, his lines not having all been run with the same variation, nor his distances always accurately chained.

I first sought to locate his original corners, the posts set by him having long since disappeared. I found a mulberry stub standing on the line between sections 15 and 16, and 16.23 chains south of the northwest corner of sec. 15, which is an original witness tree, as noted by him. At the termination of the section line between sections 5 and 6 a maple tree witnessed by him has been standing, up to about one year ago, but the stump, now five feet in diameter, with witness marks on it, is still there. Each of these points so located are also points on the meander line, and the surveyor's records in my office, as well as oral testimony of the old inhabitants, go to show beyond question that these are corners established by Mr. Fowler.

In 1856 A. T. Whittlesey, who was the surveyor of Vanderburgh County, reëstablished the northwest corner of sec. 14, putting down a cypress post, which he afterwards replaced by a stone, which now marks the corner. One of the original witness trees was then standing. At the same time he reëstablished a point on this line between sections 14 and 15 and 40 chains south of the northwest corner of sec. 14, by a cedar post which is still standing. At that point one of the original witness trees was then standing. The distance was by close measurement 39.91 chains. This line produced south from said northwest corner of sec. 14 64.25 chains, the distance given by Mr. Fowler, fixes its termination and also a point on the meander line. The variation is 2° 30′.

The northeast corner of sec. 16 was reëstablished by A. T. Whittlesey, surveyor of Vanderburgh County, in 1856. The box elder witness tree noted by Mr. Fowler was standing at that time. From that corner running west 29.67 chains the distance given by Mr. Fowler, gives the termination of the section line between sections 9 and 16, which is also a point on the meander line. The northeast corner of sec. 16 is also 16.23 chains north of the corner by the
*531 mulberry stub, this * being the distance given by Mr. Fowler, and has a variation of 3° 40′.

At the northwest corner of sec. 9, J. Lindsley, surveyor of Vanderburgh County, in 1837, set a white oak post to reëstablish the corner, the original witness trees being then standing. In 1855, C. G. Olmstead, surveyor of Vanderburgh County, replaced the oak post by a mulberry post, and in 1874 this was replaced by a limestone, set by August Pfafflin, surveyor of Vanderburgh County, which stone is still there. Commencing at that point and running south 49.84 chains, the distance given by Mr. Fowler, I found the termination of the line between sections 8 and 9, which is also a point on the meander line. This variation is 3° 30′.

Running west from the northwest corner of section 9, 58.00 chains, the distance given by Mr. Fowler, gives the termination of the line between sections 5 and 8, and also a point on the meander line.

The southwest corner of sec. 32, T. 6 S., R. 10 W., I established from two old monuments, one at the northwest corner, and the other at the southeast corner of said section. This line between the southeast and southwest corners had a variation of 2° 50′. From this corner so established, I ran south 51.72 chains to a post near the maple stump, original witness tree, Mr. Fowler giving the distance as 51.50 chains. This line had a variation of 3° 00′, and its termination is also a point on the meander line. From the southwest corner of sec. 32 I ran west 25.70 chains, the distance given by Mr. Fowler, which is the termination of the line between section 31, T. 6 S., R. 10 W., and section 6, T. 7 S., R. 10 W., and also a point on the meander line.

In this way I found seven points which are as closely absolutely correct as it is possible to locate them after a lapse of ninety years. Primarily fixed points, if correct, must govern as against distances or compass variations, secondly, distances, and lastly, courses. Upon this basis I ran the meander line, following Mr. Fowler's notes as closely as possible, and making such corrections as were necessary. It was impossible to follow them exactly, for the reasons already
*532 stated, that the * compass variations on the lines between section corners established by Mr. Fowler vary from one to two degrees, and in only one instance has a line the correct variation, and in 28 distances given by him, which I remeasured, 12 of them varied from two to seventy-four links each.

The following are the field-notes for the meander line:

Commencing at a post at a point on the bank between fractional sections 9 and 16, T. 7 S., R. 10 W., running thence up stream as corrected. Witnessed sycamore 6′ N. 82° W. 1.31 chains S. 60° E. 26.31 chains. Variation 3° 05′.

Post witnessed, sycamore S. 12° 50′ E. 4 links S. 69° E. 7.73, var. 3° 05′ to a post between secs. 15 and 16.

Witnessed by stub of original mulberry S. 66° W. 4 links S. 69° E. 19.84, var. 3° 15′.

Post witnessed, stake N. 43° 30′ E. 25 links, and stake N. 36° 30′ W. 25 links. S. 70° E. 18.38, var. 3° 15′.

Post witnessed, stake N. 44° 30′ E. 45½ links and apple tree S. 63° W. 28 links. S. 56° E. 22.01, var. 3° 15′.

Post witnessed, stake, N. 43° 30′ E., 50 links, and stake N. 36° 30′ W. 50 links. S. 49° E. 17.91 var. 3° 15′.

Post witnessed, stake, N. 40° 50′ E. 65 links and stake N. 66° 30′ W. 50 links. S. 45° E. 9.92, var. 3° 15′.

Post witnessed, stake, N. 40° 20′ E. 68 links and stake N. 66° 30′ W. 50 links. S. 63° E. 5.00 var. 3° 15′ to a post between secs. 15 & 14.

Witnessed, honey locust 24″ S. 8° 15′ W. 78 links Sec. line S. 6.37 ch. to water's edge of Ohio River. S. 73° E. 5.50, var. 3° 15′.

Post witnessed, cottonwood, 16″ S. 14° 50′ W. 1.71 ch. S. 82° E. 16.00, var. 3° 15′.

Post witnessed, osage orange 6″ S. 54° 45′ E. 26½ links and osage orange 8″ S. 62° W. 36½ links. S. 3.88 ch. to water's edge, Ohio River.

From the post between secs. 9 and 16 running down stream: N. 63° W. 14.60 chains, var. 2° 45′.

Post witnessed, sycamore snag, 36″ N. 81° 55′ E. 86½ links N. 61° W. 44.00 to a post between secs. 8 and 9, var. 2° 45′.

Post witnessed sycamore 48″ S. 45° 30′ W. 54 links N. 57° W. 25.00, var. 2° 00′.

*533 * Post, sycamore stump 40″ S. 42° 30′ E. 72 links N. 54° W. 14.20 var. 2° 00′.

Post witnessed sycamore snag N. 78° E. 56 links N. 46° W. 30.00, var. 2° 00′.

Post witnessed, elm, 38″ N. 31° 40′ W. 2.53 chains N. 40° W. 7.12, var. 2° 00′. Post between secs. 5 and 8.

Witnessed sycamore 40″ S. 74° 50′ W. 21½ links, and cottonwood snag 21″ N. 40° 30′ W. 80 links. N. 40° W. 19.00, var. 2° 30′.

Post witnessed, sycamore, 32″ S. 4° 15′ W. 2.56 ch. N. 34° W. 18.84 to a post between secs. 5 and 6, var. 2° 30′.

Post witnessed, maple 60″ N. 65° W. 27 links, original witness tree. N. 32° W. 17.75 to a post, var. 2° 00′.

Post witnessed, sycamore snag 45″ S. 43° 15′ W. 16 links N. 25° W. 40.00 to a post between sec. 6, T. 7 S., R. 10 W., and sec. 31, T. 6 S. R. 10 W., var. 2° 00′.

Post witnessed, maple snag, 20″ N. 66° 30′ E. 53 links, and maple 24″ S. 83° 30′ E. 52 links. N. 12° W. 36.00 to a post, var. 2° 30′.

Witness stake on river bank S. 78° W. 4.70 ch. and post N. 78° E. 4.00. Distance 5 chains S. 78° W. to water's edge, Ohio River.

At points marked A, B, C, etc., corresponding to the same letters on the map, cross section levels were taken across the meander line to the bank on the southwest side of the slough, taking low water mark on the gauge at Evansville as the base, and from the section line between secs. 14 and 15 to the point where meander line ends in section 31, T. 6 S., R. 10 W. The difference of elevation in the water surface at those extreme points is 16 inches.

Accompanying this report is a map of the lands lying between Evansville and a point opposite the mouth of Green River on a scale of 10 chains to an inch, showing section and meander lines, and the topography near the meander line, and marked Exhibit "C." Also a cross section of the levels taken, marked Exhibit "F."

Respectfully submitted. C. C. GENUNG.
Jan'y 22d, 1896. *C. E. and S. V. C.*

*534 * EXHIBIT "E."

To the Honorable Board of Commissioners, on the Indiana and Kentucky Boundary Line at Green River Island.

GENTLEMEN: The line of the low water mark of 1792, from the head to the foot of Green River Island, has been located as ordered by you, and the commencement, terminus and each intermediate angle marked by planting a cedar post five inches square and seven feet in length in the ground to a depth of four and one half feet. The line is, except at the commencement and ending, two chains (132 feet) to the left of the meander line going down stream, and parallel

thereto. The angles, checked by the needle, were taken twice, and each distance carefully measured twice to avoid the possibility of errors. The line is laid down on the map marked "Exhibit C" in red ink, and the distances are given in feet. The true meridian was obtained by observation of Polaris on two different nights.

The following are the notes of the location:

Commencing at a point on the line between sections fifteen (15) and fourteen (14), township seven (7) south, range ten (10) west, and 67.25 chains south of the northeast corner of section fifteen (15). The post set at this point is witnessed by a sycamore tree 36 inches, S. 1° 55′ E. 43.8 ft.; and also by a honey locust 32 inches, S. 67° 50′ E. 24 ft., and is at the head of Green River Island, and also assumed low water mark in 1792. From this point going down stream and making an angle to the left from the east line of section fifteen (15) of 50° 26′, and on a course of N. 49° 16′ W., a distance of 1098.55 ft. to a post witnessed by a cottonwood 48 inches, N. 79° 45′ W. 163 ft.

Angle to right 0° 45′ 15″, course N. 48° 30′ 45″ W. 1171.45 ft. to a post, witnessed by a sycamore 22 inches, S. 66° 50′ E. 398 ft.

Angle to left 6° 50′, course N. 55° 20′ 45″ W. 1432.35 ft. to a post, witnessed by a red elm 48 inches S. 81° 40′ E. 150.5 ft. And also a red elm 60 inches, S. 83° 20′ E. 160 ft.

Angle to left 13° 43′ 15″, course N. 69° 04′ W. 1187.2 ft. to a post witnessed by a sycamore 41 inches, S. 87° 15′ E. 149.7 ft.; and also a sycamore 48 inches, S. 88° 20′ E. 156.2 ft.

*535 * Angle to right 0° 42′, course N. 68° 22′ W. 1312.6 ft. to a post, witnessed by a sycamore 15 inches, S. 16° 15′ E. 80.5 ft. and a sycamore 11 inches S. 18° 00′ E. 79.6. ft.

Thence on same tangent and course 520.55 ft. to a post, witnessed by a cottonwood 16 inches, S. 8° 45′ E. 61.4 ft.

Angle to right 9° 01′ 30″, course N. 59° 20′ 30″ W. 1735 ft. to a post witnessed by a sycamore 64 inches, N. 13° 40′ W. 130 ft.

Angle to left 2° 37′, course N. 61° 57′ 30″ W. 964.6 ft. to a post, witnessed by a cottonwood 30 inches S. 44° 00′ W. 67 ft., and a cottonwood 37 inches, S. 34° 40′ W. 70.3 ft.

Angle to right 2° 06′, course N. 59° 51′ 30″ W. 2926.5 ft. to a post, witnessed by a sycamore 48 inches, N. 74° 50′ E. 146.5 ft. Also a sycamore 56 inches, N. 27° 30′ E. 94.8 ft., and a stone on section line, between sections eight (8) and nine (9) N. 32° 30′ E. 132.6 ft.

Angle to right 4° 36′ 30″, course N. 55° 15′ W. 1659.6 ft. to a post, witnessed by a cottonwood 22 inches, S. 17° 15′ W. 141.7 ft.

Angle to right 3° 05′ 30″, course N. 52° 09′ 30″ W. 952 ft. to a post, witnessed by a sycamore 60 inches, S. 88° 05′ E. 254 ft. and a sycamore snag 31 inches, N. 49° 25′ E. 164.4 ft.

Angle to right 7° 56′ 30″, course N. 44° 13′ W. 2004.1 ft. to a post witnessed by an elm 60 inches, N. 2° 35′ E. 230.5 ft.

Angle to right 5° 58′, course N. 38° 15′ W. 477.65 ft. to a post, witnessed by a sycamore 56 inches, N. 29° 45′ E. 115 ft.

Angle to left 0° 40′, course N. 38° 55′ W. 1259 ft. to a post, witnessed by a sycamore 36 inches, S. 44° 55′ E. 131.3 ft., and a cottonwood 40 inches, S. 42° 50′ W. 155 ft.

Angle to right 6° 07′ course N. 32° 58′ W. 1257 ft. to a post, witnessed by an elm 53 inches, S. 43° 25′ E. 578 ft. and the stump of the original maple witness tree of 1806, 65 inches, N. 49° 55′ E. 126 ft.

Angle to right 2° 42′, course N. 30° 06′ W. 1186.6 ft. to a post, witnessed by a sycamore snag 28 inches, N. 69° 15′ E. 102.7 ft.

Angle to right 7° 03′ 30″, course N. 23° 42′ 30″ W. 2735.7 ft. to a post, witnessed by a maple 36 inches, N. 78° 00′ E. 165.3 ft.

*536 * Angle to right 12° 17′ 30″, course N. 10° 45′ W. 1202.12 ft. to a post opposite the lower end of Green River Island, and at low water as it was in 1792, witnessed by a sycamore 52 inches, N. 65° 35′ E. 363.45 ft. The above courses are run from the true meridian as ascertained by observation at the point on the map marked "W" on the line between township six (6) and seven (7).

Respectfully submitted.

C. C. Genung,
C. E. and S. V. C.

Feb'y 3d, 1896.

Exhibit "G."

Statement of Costs and Expenses

C. C. Genung, civil engineer, services rendered by order of the commission		$575 75
Expenses of Lieut. Col. Amos Stickney, U. S. A., commissioner	$64 60	
Services as member of the commission	500 00	564 60
Expenses of Gaston M. Alves, commissioner	20 00	
Services as member of the commission	500 00	520 00
Expenses of Gustavus V. Menzies, commissioner	20 00	
Services as member of the commission	500 00	520 00
F. A. Guthrie, typewriter		15 00
Kellar Printing Company		41 25
Total		$2236 60

And the court being now fully advised in the premises:

It is ordered that the exceptions to the report of said commissioners be overruled and that the report of said commissioners be, and the same is hereby, confirmed.

And it is ordered, adjudged, and decreed that the boundary line between said States of Indiana and Kentucky in controversy herein be, and it is hereby, established and declared to be as delineated and set forth in said report and the map accompanying the same and referred to therein, which map is hereby directed to be filed as a part of this decree.

*537 It is further ordered, adjudged, and decreed, that the said * boundary line as described in said report and as delineated on said map, and now marked by cedar posts, be permanently marked as recommended in said report, with all convenient speed, and that said commission be continued for that purpose, and make report thereon to this court, and that this cause be retained until such report is made.

It is further ordered, adjudged, and decreed that the compensation and expenses of the commissioners and the expenses attendant on the discharge of their

duties, up to this time, be, and they are hereby, allowed at the sum of two thousand two hundred and thirty-six dollars and sixty cents in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged, and decreed that this decree is without prejudice to further proceedings as either of the parties may be advised for the determination of such part of the boundary line between said States as may not have been settled by this decree under the pleadings of this case.

And it is further ordered, adjudged, and decreed that the clerk of this court do forthwith transmit to the chief magistrates of the States of Kentucky and Indiana copies of this decree duly authenticated under the seal of this court.[1]

per Mr. Chief Justice Fuller.

May 18, 1896.

State of Missouri v. State of Iowa

Supreme Court of the United States, 1897.

[165 *United States,* 118.]

The report of the commissioners appointed February 3, 1896, 160 U. S. 688, to find and re-mark the boundary line between the States of Missouri and Iowa, is confirmed; and it is ordered that that boundary line be as delineated and set forth in said report.

Mr. R. F. Walker, Attorney General of the State of Missouri, for that State.

Mr. Milton Remley, Attorney General of the State of Iowa, for that State.

Mr. Chief Justice Fuller announced the decree of the court.

This cause coming on to be heard on the application of the State of Missouri, the State of Iowa consenting thereto, for decree on the report of James Harding, Peter A. Dey and Dwight C. Morgan, commissioners appointed by decretal order herein on February 3, 1896, to find and re-mark with proper and durable monuments such portions of the proper boundary line between the States of Missouri and Iowa, as run, marked and located by Hendershott and Minor, commissioners of this court, under the orders and decrees of this court of February 13, 1849, and January 3, 1851, as have become obliterated, especially between the fiftieth and fifty-fifth mile posts on the same; and it appearing that a difference of opinion has arisen in respect of certain allowances to be included in the expenses incurred in re-marking said boundary line, it is ordered by the court that Commissioner Morgan be allowed his per diem for forty-six days' services, and that the account of expenses attached to said report be completed by the addition of that per diem in favor of said commissioner, and that said

[1] For the final phase of this case see *Indiana* v. *Kentucky* (167 U. S. 270), *post,* p. 1264.—Editor.

report as so completed in that particular be and the same is hereby in all things confirmed, as follows:

*119 * "To the honorable the Supreme Court of the United States:

"The undersigned, commissioners, appointed by the decree of your honorable court dated February 3, 1896, to find and re-mark with proper and durable monuments such portions of the boundary line between the States of Missouri and Iowa, run, marked and located by Hendershott and Minor in accordance with decree of your honorable court dated Jan. 3, 1851, as have become obliterated, especially between the fiftieth and fifty-fifth mile posts on said line, etc., respectfully submit the following report:

"On the 27th day of February last the commissioners met in the city of Chicago and fully discussed matters pertinent to the proper performance of the duties imposed upon them. Construing the decree as applying to all portions of the boundary line in question, the commissioners decided to advertise in newspapers published in counties in Missouri and Iowa adjacent to the boundary for information regarding such parts of said line as were in dispute or had become obliterated. This was done and considerable information elicited, but as the officials of one of the States interested declined to authorize the work necessary in retracing the line, excepting where directed in the decree, nothing was done beyond the finding and re-marking 'with proper and durable monuments' such portions of the line as was necessary for its proper relocation between the 40th and 60th mile points, as shown hereinafter.

"After careful consideration it was decided to apply to Gen'l W. W. Duffield, superintendent U. S. Coast and Geodetic Survey, for a detail from his corps of assistants to perform all field-work necessary in carrying out the instructions of the court. It was decided that the employment of expert officers of the Geodetic Survey corps for the services required would result more satisfactorily to the States concerned than would the selection of any private parties, as the high professional attainments of these officers and their freedom from any possible bias regarding the boundary line to be established were ample guarantees for the entire reliability and impartiality of any work done by them.

*120 "Correspondence was accordingly had with Gen'l Duffield, * who consented to detail two of his assistants, and also to supply them with a complete outfit of all instruments and appliances necessary in the prosecution of the proposed work. This offer was at once accepted. A meeting was afterwards had in St. Louis March 11th, ult., when it was decided to meet at Lineville, Iowa, a point immediately upon the boundary line between Missouri and Iowa, for the purpose of personal investigation as to the proper point or points at which to commence operations. Two of the commissioners accordingly met at Lineville on March 18th, ult., and spent three days in the examination of the boundary line and of points on said line claimed to have been established by Hendershott and Minor in 1850. The first step taken was to decide regarding the proper points between which our work of relocation of that part of the line designated in the decree of your honorable court, namely, from the 50th to the 55th mile points on the Hendershott and Minor line, should be commenced. It appeared to us that the cast-iron monuments placed by Hendershott and Minor at intervals of ten miles would naturally be more reliable than any traditional points, and the

first investigations were made as regarding the 40th, 50th and 60th mile points, these being originally marked by Hendershott and Minor with iron monuments as stated. After careful examination and much inquiry the commissioners were satisfied that the monuments marking the 40th and 60th mile points were in their original positions. As regarded the monument at the 50th mile point, whilst no positive evidence could be had as to its removal from its original position, the rumors and statements were such as to render its reliability a matter of doubt, and it was, therefore, determined to use the monuments at the 40th and 60th mile points as fixed points between which to relocate the boundary line.

"It was subsequently arranged for the commissioners to meet at Davis City, Iowa, a point on the Chicago, Burlington & Quincy railroad adjacent to the 40th mile point, where it was proposed to commence work. Gen'l Duffield was accordingly notified, and on Wednesday, April 8th, ult., the commis-
*121 sioners reached Davis City and met Messrs. W. C. Hodgkins * (in charge of work) and A. L. Baldwin, of the U. S. Geodetic Survey Corps, detailed as per arrangements made with Gen'l Duffield. These gentlemen brought with them a very complete outfit of instruments of the best description used in geodetic work, including all necessary equipment for astronomical observations as well as field-work. We proceeded to the 40th mile point on the afternoon of April 8th, ult., and arranged for the commencement of work the following day. On April 9th, ult., a party for field-work having been organized and the necessary teams and wagons hired, the entire party proceeded to Pleasanton, Iowa, a point situated immediately on the boundary line just east of the 45th mile point. Pleasanton and Lineville subsequently became the bases of operation, our parties changing from one of these points to the other as the necessities of the work required.

"Work was commenced at the 40th mile point, as arranged. It soon became quite evident that the actual boundary line as indicated by points shown and satisfactorily identified differed from the line as would be established by the field-notes of the Hendershott and Minor survey. In order that the relative positions of the actual mile points between the 40th and 60th mile points could be properly determined, and also their true relation to the theoretical points as found in accordance with the courses and distances shown in Hendershott's report, it was deemed necessary to establish a chord or base line twenty miles in length between the 40th and 60th iron monuments to which all points actually found and definitely located or shown and claimed as being upon the boundary line could be referred and from which all points finally determined could be accurately located. For the details of the actual field-work and its results we respectfully refer to the accompanying report of Mr. W. C. Hodgkins, in charge of party (Appendix A). It is proper here to state that the field-work, done as it was in accordance with the precise methods of the U. S. Geodetic Surveys, was necessarily very slow and tedious, but its accuracy, in our opinion, cannot be questioned. The measurement of the twenty-mile base line involved a
*122 very great amount of labor, whilst the computations necessary in the * exact reduction of the measurements were also very laborious. Complete topographical notes were also taken for the entire work, but the commissioners have deemed it unnecessary to have maps prepared, as their preparation would involve a considerable expense without any corresponding benefit. The very unfavorable weather during a great portion of May and a part of June interfered seriously

with the prosecution of the field-work, causing a delay of from two to three weeks.

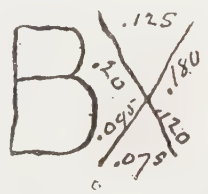
"Careful examination was made in every instance for the precise location of the original Hendershott and Minor mile points, but out of twenty-one of these points included in the survery only nine, including three iron monuments, could be satisfactorily identified. The 42d, 43d, 44th, 49th, 54th and 58th mile points were identified and located by evidence entirely satisfactory to the commissioners. As regards the 50th mile point (iron monument), concerning the reliability of which doubt had existed, the commissioners are satisfied that it is very little, if at all, out of its original position—its relation to the 49th mile point (which was clearly identified as Hendershott's original point) as determined by the base line confirming our judgment. After the work of relocation had commenced and preliminary work on the twenty-mile base well advanced, statements were made to the commissioners to the effect that the iron monument at the 60th mile point had at one time been moved from its original position. This being a matter of importance—the monument in question being considered as a fixed point in establishing the base line—an inquiry was had regarding it and a considerable amount of testimony heard. This testimony was very conflicting, but after its careful consideration and the prolongation of the base line some four miles eastward of the 60th mile point the commissioners were satisfied that the monument was occupying its original position.

"The location of the 52d mile point was more difficult and involved a much more extended investigation than for any point established by the commissioners. It was claimed and strongly urged that the original 52d mile point as established by Hendershott and Minor was at a point witnessed by two
*123 * trees—an elm and an oak—which trees, as well as a point established from them in accordance with Hendershott and Minor field-notes, were shown. The field-notes regarding this point and also the 53d mile point are as follows:

(Chains.)
" '80.00 Set 52d mile post.
Bearings, elm 18 inches diameter, N. 7¼° E. 10½ links; burr oak 12 inches diameter, S. 22° W. 28 links.'
(Continuing:)
" 'N. 88° 47 E.'
(Chains.)
" ' 0.30 A pond 250 links wide; direction of its length, N. & S.
5.00 Prairie.
15.00 Timber.
30.00 Field (Stokes') fence, nearly N. & S.
57.50 Left field.
80.00 Set 53d mile post. Bearings, black oak 8" diameter, S. 53° E. 15 links; black oak 6" diameter, N. 53° E. 64 links.'

"The trees shown and claimed as being the original witness trees for Hendershott and Minor's 52d mile point agree very well with the field-notes as regards their distance from the 51st mile point, and also as to their relative positions to each other. The distances and bearings of these trees from the point shown and claimed as the original Hendershott mile point also agree with the field-notes closely. Beyond these coincidences, however, there is, in our judg-

ment, nothing whatsoever to warrant a conclusion that they were ever marked as witness trees by Hendershott and Minor. In their report (10th Howard, pages 15 and 16) they state: 'In timber the number of the mile is marked on the witness trees with the letter appropriate to each State, there being one tree marked on each side of the line whenever possible. The foot of each witness tree is marked with the letters "B L."' The oak tree shown and claimed to be a
*124 witness tree for the 52d * mile point had a large 'blaze' on its trunk about five feet from the ground. Nothing whatever could be ascertained by the commissioners to in any manner indicate what, if any, marking had been inscribed on the blaze, nor could any information be had concerning such marking. At the foot of this tree, facing N. 45° E., is to be seen a blaze on which is plainly discernible the letters 'B X.' The blaze on the trunk of the tree faced directly east, whilst the point to which it is claimed to refer is but 22° east of north from the tree. It is the universal custom of surveyors in marking witness trees, so far as the experience of the commissioners goes, to make such marks so as to face as nearly as possible the point witnessed. The 'B X' mark faces certainly 25° east, and the blaze on trunk of tree 68° east of the point claimed to be witnessed. Measurements of the 'X' mark at base of tree are as follows, in tenths of one foot:



"The mark inclining to the left extends above the letter 'B' and is quite close to the upper curved line. The mark inclining to the right runs closely to the lower part of the 'B.' It would have been quite as practicable to have cut a letter 'L' as an 'X' on the blaze found at foot of this tree, and the commissioners were not prepared to accept this letter 'X' as an 'L' without stronger corroborative evidence than they could obtain. This tree, if marked by Hendershott and Minor, must have been so marked forty-six years ago. A section of the tree at a point eight feet above the ground, the tree being very uniform in size, from three feet above the ground for eight to nine feet above, was cut and sent to Prof. McBride, botanical expert at the University of Iowa, for his opinion as expert) as to its age, &c.

"In a letter from him to Commissioner Dey, May 19th, 1896, he states:
*125 * "'I judge that the tree when felled was 70 years old. Its history runs about as follows: 59 years ago it received an injury (blaze?) of which a scar persists. The tree at the time was about 11 years (11–16) old, and not to exceed, bark included, 3¼ inches thick. I say about 11 years, for it takes some years not recorded on the section for a tree to attain six feet in height. 25 years later the tree had added about 2½ inches to its radius. The next 17 years a little more than one inch to the radius, making the diameter of the wood (bark not counted) about 8¼ to 8½ inches. Since this another inch of wood has been added to the radius. Calling this 17 years (it is more rather than less, as the

annual increment is constantly smaller,) we have the total since the scar, 59 years.'

"This oak tree, as shown by Prof. McBride, at a point where section examined by him was cut, was 8¼ to 8½ inches in diameter when 53 to 58 years old. Being 70 to 75 years old, it would have been 24 to 29 years old in 1850, and its diameter where blaze was found could not have exceeded 5 inches. As the blaze shows a face of fully eight inches, it is evident it could not have been cut on a tree with a diameter of only five inches. The diameter of this tree at base, where 'B X' mark was found, is now 15 inches. Applying the proportionate growth of tree as shown by Prof. McBride, and its diameter at base could not have exceeded 8.5 inches 46 years ago, and its size was not sufficient to have received the blaze now shown.

"Regarding the elm tree, also claimed to be a witness tree for the original Hendershott 52d mile point. This tree also has a large blaze about four feet from the ground. Nothing whatever was shown to prove that it ever had any mark upon it (prior to the time of a private survey made in 1893) other than the characters 'S 28.' The letter 'S,' if it ever existed, is now totally obliterated. The figure '2' is still plainly discernible, and a part of the upper portion of a figure '8' to the right of the '2' can also be traced. Nothing was shown to prove
that it was ever marked at its base with the letters 'B L,' as it should have
*126 been were it a Hendershott witness * tree. Diligent search had evidently
been made at some time for this mark, as is plainly evidenced by the chopping at its base, and had the proper marks ever been found it is quite certain the fact would have been in evidence before the commissioners.

"The Hendershott notes show that at 30 links eastward of the 52d mile point the bank of a pond was reached, and that the pond itself was 250 links in width, making a distance of 280 links from the 52d mile point to the east bank of pond. The bank of this pond directly east of the 52d mile point, claimed to be witnessed by the 'elm and oak,' has evidently moved eastward to some extent since 1850, as shown by present conditions. Measurements made by the commissioners show that 280 links eastward from the point claimed as the Hendershott 52d mile point reach a point 59 links east of the present bank of the pond. Thirty chains east of their 52d mile point, as seen by their notes, the Hendershott line crossed the 'Stokes' field fence. The line of this fence is still plainly visible. A line straight from the 52d mile point, claimed to be witnessed by the 'elm and oak,' to the 54th mile point will pass at least 70 feet south of the 'Stokes' fence line, as noted by Hendershott. For more than thirty years, and after the establishing of the boundary line by Hendershott and Minor, it is claimed a road was maintained and worked as a Missouri road between the 52d and 54th mile points, and that until within the past five years this fact was never questioned. It is claimed that the line recognized by parties living on both sides of the boundary as being the Hendershott line since his survey and until within the past few years is now plainly shown for a very considerable distance between the 52d and 53d mile points by the line of what is known as the 'Fugate' fence line. It is claimed this fence was put up by one Fugate, the owner of land in and a resident of Iowa (and who was also a surveyor), and who, living as he did close to the line and present when the Hendershott survey was made, probably knew where the true line was and placed his fence on that line. This

line very closely agrees with a line running directly from Sullivan's 52d
*127 mile point to the 54th mile point, * the last named having been satisfactorily identified and located by the commissioners. It is claimed to be improbable that Fugate placed his fence north of the proper line.

"The commissioners most carefully considered all the conditions relating to the point claimed to be the Hendershott 52d mile point and witnessed by the 'elm and oak,' but the more the matter was weighed the stronger became their conclusion that the trees mentioned could not have been the witness trees as claimed. Coincidences of position constitute their claim. It is proper here to state that within a short distance to the north of the 52d mile point as established by the commissioners are the stumps of an elm and burr oak which agree as well as do the other elm and oak as to distance from the 51st mile point, better as to topographical conditions, and are very similar as to the relative position required by the field-notes for the witnesses to the 52d mile point. The commissioners have no idea that these stumps referred to were those of Hendershott's witness trees, but make this statement to show that coincidences such as shown by the 'elm and oak' are not impossible. To have crossed the 'Stokes' fence, in a distance of 30 chains, starting from the supposititious 52d mile point claimed to be witnessed by the elm and oak, an angle of at least 2° to the left would have been necessary, and also another angle to the right equally great in order to run directly to the 54th mile point. Hendershott's notes make no mention of any such angles. The angle recorded as having been made at the 52d mile point was 29′ to the north, the course having been changed, according to the Hendershott notes, from N. 89° 16′ to N. 88° 47′ E. We are satisfied, from personal investigation and from points found and referred to our base line, that the original Sullivan line can be readily traced from his 51st mile point to his 52d mile point, and we believe it is very probable that the Hendershott line between the 52d and 54th mile points is nearly identical with the Sullivan line. Whilst we did not adopt the Sullivan line between the points named, very good reasons could have been given for doing so. The Hendershott notes make
*128 no mention of Sullivan's line after leaving his 49th mile * point until his 54th mile point was reached. They make no mention of finding Sullivan's 52d mile point or of any trees on his line; but they say in their report (page 4, 10th Howard Report) that they 'discovered abundant blazes and many witness trees which enabled us to find and re-mark the said (Sullivan) line as directed by the court.' Also on page 7, same report, it is stated: '*But in heavy bodies of timber no difficulty was experienced in discovering evidences of the precise location of the* (Sullivan) *line, not only by blazes, but by line and witness trees.*' (Italics are ours.) And on the same page, 'The general topography of the country, and especially the crossing of the streams, greatly facilitated us in following the line, and in some instances, when confirmed by the old blazes, enabled us to establish it with sufficient certainty.' Commencing some ten chains east of the 51st mile point, the country through which the boundary line passes was and is heavily timbered, and, as before stated, the Sulivan line in the timber is at this time readily to be found. The inference that the Hendershott line eastward from the 51st mile was nearly identical with the Sullivan line is quite as strong as the contrary, notwithstanding no mention is made by Hendershott of the Sullivan line after leaving a point 6.20 chains east of the 49th mile point until reaching the 54th mile point.

"The Sullivan line, between the 51st and 52d mile points, as shown by his field-notes, crossed the east fork of Grand River (now called Weldon) three times. This line now, by reason of changes in the bed of the stream, will cross the Weldon five times. With the exception of the 'elm and oak,' there were no traditional or apparent evidences claimed as indicating the original location of the Hendershott and Minor 52d mile point. A line run eastward with the bearings given by the Hendershott notes from their 51st mile point would pass at least 40 feet south of the point indicated by the 'elm and oak.' A line run eastward, as per the Hendershott notes, from the point claimed as the Hendershott and Minor 52d mile point would pass at least 90 feet south of their 54th mile point.

The commissioners carefully considered all the comparatively authentic
*129 traces of the Hendershott line, together * with the topographical conditions given in the notes of the survey. Between the 53d and 54th mile points were found evidences of the Hendershott line, which were satisfactory, and the line established by us was run from the 54th mile point, which, as before stated, was identified, directly to the 52d mile point and passing through the points found between the 53d and 54th mile points. The Hendershott notes show a line direct from the 52d to the 54th mile point.

"The line, as finally established and marked by us, between the 52d and 53d mile points is north of the boundary line as claimed for Iowa and south of that line as claimed by Missouri, and, as it happens, very nearly equally divides the narrow territory in dispute, although there was no intention to compromise the difference. We are satisfied that the line, as established by us between the 53d and 54th mile points, is very nearly, if not identical with, the original Hendershott line and in accordance with the marks of that survey. The same line was produced to the 52d mile point, notwithstanding it passes considerably south of the plainly indicated Sullivan line. The 52d mile point, as established and marked by us, was placed as nearly as possible in accordance with the notes of the Hendershott survey, evidenced by the width of the pond and also its distance from the 'Stokes' fence line.

"The field-notes of the Hendershott and Minor survey show as follows:

"At 6.30 chains eastward from the Hendershott 42d mile point Sullivan's 42d mile point was found and course changed at that point from N. 88° 53′ E. to N. 89° 06′ E.

"6.37 chains eastward of Hendershott's 43d mile point Sullivan's 43d mile point was found and course changed at that point from N. 89° 16′ E. to N. 89° 47′ E.

"7.00 chains eastward of Hendershott's 44th mile point Sullivan's 44th mile point was found and course changed at that point from N. 89° 47′ E. to N. 89° 9′ E.

"6.20 chains eastward from Hendershott's 49th mile point Sullivan's 49th mile point was found and course changed at that point from N. 89° 9′ E. to N. 89° 16′ E.

*130 "4.07 chains eastward of Hendershott's 54th mile point * Sullivan's 54th mile point was found and course changed at that point from N. 89° 16′ E. to N. 89° 2′ E.

"2.53 chains eastward of Hendershott's 58th mile point Sullivan's 58th mile point was found and course changed at that point from N. 89° 2′ E. to N. 89° 27′ E.

"In each instance it will be seen that the Hendershott courses are changed at the Sullivan mile points. The decree of your honorable court made January 3, 1851, declared that the line should be direct between each Hendershott mile point, and it is evident that the actual courses between the points referred to above are not in accordance with the recorded courses. It was found by reference to our base line in all cases where the field-notes show a straight line between such points that when the distance recorded as a straight line was two or more miles the line is actually a curve. The ordinates measured from the base line do not show any regular rate of curvature, and the curves themselves swing to the south and then to the north, the base line crossing the boundary line three times in twenty miles. The greatest distance of base line from boundary line is at the 55th mile point, which is about 247 feet north of base. The 46th mile point is 160 feet south and the 60th mile point 153 feet south of base.

"It is difficult to account for the discrepancies found between the recorded line as shown in Hendershott's notes and the line actually found. It is quite possible that the irregularities either grew out of the inaccuracy of the solar compass used on the survey or an inaccurate use of the instrument itself.

"We were surprised at the facility with which the Sullivan line could at the time of our survey be traced for considerable distances along the twenty miles of line included in our operations. Of twenty-one mile points from the 40th to the 60th, inclusive, Sullivan had witness trees for fifteen. Some of these witness trees can now be found, and also well defined line trees mentioned by him. On Hendershott's line only eight mile points out of the twenty-one referred to were witnessed by trees. Had the care shown by Sullivan in marking his line been exercised by Hendershott and Minor the line of the latter would have been
*131 much more fully * and satisfactorily defined. The hurried manner in which the work of the Hendershott survey was performed (151 miles of relocation, in addition to random lines, having been accomplished in 30 days) may in some measure account for the great lack of witness trees and other evidences necessary for an actual location of the boundary line of 1850. We are inclined to the opinion that, so far as regards the twenty miles mentioned, the Sulllivan line can be as readily relocated as can the Hendershott line.

"The decree of your honorable court requires that the line relocated by us shall be marked with durable monuments. Twenty-one mile points included in the line relocated, being from the 40th to the 60th mile, inclusive, are now marked as required. The 40th, 50th and 60th miles are marked with the cast-iron monuments originally placed by Hendershott and Minor, in 1850. Mile points intermediate are marked with stone monuments. These are of the best quality of Missouri red granite, are twelve inches square, and from 6′ 2″ to 6′ 6″ in length. The stones stand 2′ above ground (this portion being hammer-dressed) and are well finished in every particular. On the north side of each stone is plainly cut the word 'Iowa,' on the south side the word 'Missouri,' on the east side the words 'State line,' and on the west the figures denoting the number of the mile point.

"The iron monuments were reset so as to show about 18 inches above ground. The granite monuments were set with great care, their apices being exactly on the line. They were well rammed when placed in ground and will need no witness trees. Their weight averages 1050 pounds each, and we think they can safely be pronounced both durable and permanent. The amount paid

for them includes all freight charges and expenses of delivery and setting.

"Attached hereto (Appendix 'B') is a statement of the expenses consequent upon the relocation and marking that portion of the boundary line between the 40th and 60th mile points, which statement is respectfully submitted for the action of your honorable body.

"Attached hereto (Appendix 'C') is a photograph of the section of the
*132 * oak tree examined and reported on by Prof. McBride.

"JAMES HARDING,
"Comm'r for Missouri.
"PETER A. DEY,
"Comm'r for Iowa.
"DWIGHT C. MORGAN,
"Of Illinois.

"Chicago, Ill., Sep. 18, 1896."

"APPENDIX A.

"U. S. COAST AND GEODETIC SURVEY,
"SALINA, KANSAS, *June* 20th, 1896.

"Gen. James Harding, Hon. Peter A. Dey, Dwight C. Morgan, Esq., commissioners in the matter of the boundary line between the States of Missouri and Iowa.

"DEAR SIRS: I have the honor to submit the following report upon the operations conducted under my direction for the purpose of enabling you to locate and mark by 'durable monuments,' as required by the decree of the Supreme Court of the United States dated February 3rd, 1896, that portion of the boundary line between the States of Missouri and Iowa which lies between the fortieth and sixtieth mile posts east of the old north-west corner of Missouri, as marked in 1850 by H. B. Hendershott and W. G. Minor, commissioners.

"It appears unnecessary for me to make any mention in this report of the antecedent circumstances leading up to this survey, as you are well acquainted with them, and will, no doubt, take occasion to allude to them in your own report to the Supreme Court.

"I therefore pass at once to my own work.

"Your board having applied to General W. W. Duffield, superintendent of the U. S. Coast and Geodetic Survey, for the detail of an officer to make the necessary surveys, I was selected for that duty, and Mr. A. L. Baldwin, also of the C. & G. Survey, was assigned to the party as assistant observer.

"In compliance with the request of your board, received through Mr.
*133 Morgan, we met you on April 8th, 1896, at Davis * City, Iowa. A preliminary inspection of the western portion of the field work was made on that day and the organization of the party was completed by engaging laborers and teams.

"On the following day the whole party was transferred to the village of Pleasanton, Iowa, that place being centrally located for the western half of the work, as it is directly on the boundary and just east of the forty-fifth mile post.

"A partial examination of the line, as identified by more or less reliable traditions current in its neighborhood, made it evident that its course in many

places deviated widely from the description given in the field-notes attached to the report of the former commission. (Howard's Reports, Supreme Court U. S., vol. X.)

"Not only do the bearings differ from those recorded in that report, but portions of the line which are there called straight were found to be curved or composed of broken lines.

"Under these conditions it seemed inexpedient to attempt to reproduce upon the ground the courses and distances of the former survey.

"Such an attempt would undoubtedly have led to serious confusion, and would have furnished little information of real value, while the labor of making the necessary corrections would have been excessive.

"In place of that undesirable plan I adopted, with your approval, the method of measuring a base line straight across the country for the twenty miles to be surveyed.

"All of the old points which were recovered and all new points which it became necessary to locate upon the ground were directly referred to the base line, which, from a mathematical point of view, is the axis of abscissæ in a system of rectangular coördinates.

"It seems scarcely necessary to mention the advantages which this method affords in point of simplicity and accuracy of work, but it may do no harm to allude very briefly to a few of them.

"Thus the relative positions and bearings of different portions of the boundary can be readily found with far greater precision than would otherwise be easily practicable.

*134 "Moreover, in this system of work each point of the boundary * is fixed independently of every other point, all being directly referred to the base line. This characteristic permits any desired local correction to be made at any point without necessarily affecting points on either side, a feature which I consider very essential in work of this character. The base line was so selected as to lie along the general direction of the boundary, which in fact crosses it three times, eleven of the twenty-one monuments being north of the base and the other ten south of it.

"This statement well illustrates both the irregularity of the boundary and the fact that the base line is very close to the general direction of the line.

"Another important consideration in the selection of the base line was to make it pass through the towns of Pleasanton and Lineville without meeting obstructions and without damaging private property.

"This was successfully accomplished, and in the whole course of the line remarkably little tree-cutting was needful. The base line was ranged out with an eight-inch theodolite, the standards of which were high enough to permit the telescope to transit. The telescope was of excellent quality and was provided with an eye-piece micrometer, by means of which slight deviations from the straight line could be measured and corrected.

"As the work of locating the base line advanced eastward the party was moved to Lineville, Iowa, which town is situated just north of the boundary line and between the fifty-sixth and fifty-seventh mile posts, and thenceforward operations were conducted from either Lineville or Pleasanton, as was found more convenient from time to time.

"As soon as the line was opened, and even before the final adjustment of its eastern terminus, the linear measurement was begun by Mr. Baldwin, with the assistance of the commissioners, working westward from the east end of the base, near the sixty-mile monument.

"When about five and one-half miles had been so measured I was ready to take personal charge of the measurement, and began at the west end of the base, near the forty-mile monument, working thence eastward to a junction with the line above mentioned.

*135 * "The system of measurement employed was that ordinarily used in the Coast and Geodetic Survey for direct measures not requiring the base apparatus.

"A narrow steel tape, twenty-five metres in length between end marks, was stretched under a tension of ten kilogrammes, as indicated by a spring balance attached to one end of the tape. The successive tape-lengths were marked on stakes driven into the ground.

"As the tape necessarily follows very closely the inclination of the ground, the horizontal distance will be less than the measured distance, and the correction for slope must be computed for each tape-length, the difference of height between the ends being determined by spirit-level. The very irregular profile of this line made these differences of height unusually great, and correspondingly increased the amount of correction.

"A small correction for catenary is also necessary when the tape swings clear of the ground, the 'sag' of the tape slightly decreasing the distance between its ends. Further, as all metallic measures vary in length with changes of temperature, it is necessary to apply a correction for such variations, the length of the tape being known at the temperature of zero, Centigrade.

"Temperatures were accordingly noted at frequent intervals, usually at every fourth tape.

"The direct measurement was completed on May 8th, although the eastern part of the line had still to be levelled.

"The computations were at once taken in hand and the resulting distances were furnished you as rapidly as possible.

"These results, for present purposes and as compared with ordinary measures, may be considered practically exact, and they show that the chain used by the surveyors of 1850 was too long, probably from the combined effects of abrasion and of high temperature.

"The distances between such of the old points as were recovered are nearly always too great. The ratio of excess is not constant, as, indeed, would hardly be expected, but shows a tendency to increase in going from west to east.

"A marked exception of this rule of excess in distance is found in the

*136 fifty-second mile. The eastern end of this mile * was not recovered, but was found with reasonable certainty from various considerations, while the reputed point at the western end was recovered. The mile so determined is noticeably less than a statute mile. The western part of this mile traverses a very steep, rough, and wooded country, while its eastern part crossed the Weldon River three times in 1850.

"These natural difficulties in the way of accurate measurement probably caused the shortage in this particular mile.

"In my own work I found it desirable to avoid the direct measurement of this mile, which is even more unfavorable now than in 1850, the Weldon having changed its course sufficiently to cross the base line five times at present.

"For this purpose a branch base about seven-eighths of a mile in length was measured on the flat ground east of the Weldon, and the distance across the broken section was then obtained with great precision by triangulation. The distances across the Grand River and Little River were also obtained by triangulation.

"Whenever in the course of the measurement we passed a point which it was desirable to refer to the base line, the point at which its rectangular ordinate met the base line was noted and the length of the ordinate itself was measured. The relative positions of these various points thus became known, including not only such of the mile points as could be identified, but also numerous objects commonly reputed to mark the boundary, as fences, trees, stones, etc.

"As far as possible in connection with the measurement, notes were made to provide material for a topographic sketch of the strip of country traversed by the boundary.

"As stated above, the measurement was completed on May 8th. As rapidly as the reductions were computed the places for the mile stones were marked on the ground from the fortieth to the forty-ninth.

"The weather, which up to that time had been generally favorable, now became very wet. The frequent and heavy rains seriously interfered with the work, and rendered progress across the country very slow, the roads being nearly impassable and the fords quite so. On May 18th the exigencies of the reg-
*137 ular work of the Coast and Geodetic Survey compelled * the detachment of Mr. A. L. Baldwin, who had rendered energetic and efficient assistance in the work.

"On the same day I moved from Pleasanton to Lineville to resume work on the eastern part of the line. In the intervals between rains I completed the levels, and, after computing the distances, marked the places for the mile posts, a work in regard to which further details will be given below. The topographic notes were also completed.

"In order to furnish as much information as possible in regard to this portion of the boundary line, observations for the approximate determination of the latitude and longitude and of the astronomical azimuth or bearing of the base line were made at Pleasanton and at Lineville.

"Bad weather interfered with the observations at Pleasanton, and at Lineville the lack of time and unfavorable local conditions somewhat affected the precision of the results, which answer, however, the purpose desired. Latitude and azimuth were obtained by observations on Polaris (α Ursæ Minoris) with the theodolite. Time was obtained by sextant observations of the sun, using a mercurial horizon and the method of equal altitudes. For longitude the local time was compared with the railroad telegraphic time signals. It remains for me only to state briefly the old points which were recovered and the conditions which, under your decisions, governed the location of those points which were not identified by local marks.

"The fortieth, the fiftieth and the sixtieth mile points were found marked by the iron monuments placed there by Commissioners Hendershott and Minor in

1850. There was some dispute as to whether No. 60 was in its original position or not, but the weight of evidence and the continuity of the traditional line on either side of it indicated pretty conclusively that it had never been disturbed.

"The remaining points were originally marked by stakes, sometimes witnessed.

"No. 42, while not directly identified by marks, was satisfactorily recovered by means of a 'line tree' four chains W. and by topographical notes at crossing of Grand River, as shown in original record.

*138 * "No. 44 was restored by measurement from the two witness trees, the decaying stumps of both of which were found.

"No. 49 was also identified by the stumps of both witness trees.

"No. 51 was marked by a 'mound and pit,' which have been accepted for years as the true marks.

"No. 54 was marked by a stone, and was further identified by one witness tree.

"No. 58 was recovered by traces of the stakes in addition to the remains of the witness tree, and the point established by J. C. Sullivan in 1816 was also found a little further east, and also the stump of an elm tree, noted as a 'line tree' in both Sullivan and Hendershott notes, being 4.10 chains W. of Hendershott's 58th mile point. The remaining points were located in the following manner:

"No. 41 was placed midway on line between 40 and 42.

"No. 43 was so placed as to preserve the relations with 42 and 44 required by the field-notes of 1850, and after being so located was found to agree with the stump of the witness tree on the Iowa side of the line.

"No. 45 was placed in the middle of the street bounding Pleasanton on the south, which middle line is shown as the boundary on the official plat of the town on file at the county-seat, and at the proper distance along the line averaging to the 49th mile.

"No. 46 was similarly located on the line passing from 45 through a stone pointed out by tradition as marking the line.

"No. 47 was placed at the proper distance on a line drawn straight from 49 westward through a witnessed section corner between 47 and 48.

"No. 48 was placed on the same line midway between 47 and 49.

"No. 52 was located at a point west of the pond or lake in the Weldon bottom agreeing with the topographic description given by the former commissioners and on a line agreeing as closely as possible with all of the apparently authentic traces of the line surveyed in 1850.

"No. 53 was placed a mile west of 54 on the straight line between 52 and 54.

*139 * "No. 55 was placed a mile east of 54 on the extension of the line drawn from 54 through a witnessed stone at the corner common to Wayne and Decatur Counties, Iowa.

"Nos. 56 and 57 were placed at mile distances on the straight line drawn from 55 through an iron pin at the southwest corner of the streets surrounding the public square at Lineville, which pin was universally accepted as a point marking the boundary. Unsuccessful search was also made for the remains of a wooden post which formerly stood a little further east.

"No. 59 was placed midway between 58 and 60, in the manner required by the field-notes of 1850.

"While this work was in progress many of the inhabitants along the line asked that additional points, intermediate between the mile points, might be furnished them, and with your approval this was done.

"In accordance with the decree of the Supreme Court dated January 3rd, 1851, such points were always placed on the straight line between the adjacent mile posts. The final observations were made on the afternoon of June 13th, and the instruments were then packed, and on the 15th were shipped to Washington.

"I left Lineville on June 15th, also, to resume my regular duties in the Coast and Geodetic Survey.

"In closing this report permit me to express my appreciation of the uniform courtesy and consideration shown my assistant and myself by all the members of the commission, and my hope that our earnest labors in this interesting work have proved satisfactory in methods and results, and that they may be instrumental in permanently settling this controversy.

"The appended pages give in summarized form the results of the observations and measurements, as well as the mathematical formulæ employed.

"Respectfully submitted.

"W. C. Hodgkins,
"Assistant, Coast & Geodetic Survey, Chief of Party."

"Appendix A.

"The following table gives the bearings and distances between the suc-
*140 cessive mile posts of the Missouri-Iowa boundary * from the fortieth to the sixtieth mile east of the initial point as the said mile posts were relocated and marked by James Harding, Peter A. Dey and Dwight C. Morgan, commissioners, in 1896.

"The distances are given to the nearest tenth of a metre and to the nearest half foot, and the bearings or azimuths to the nearest quarter minute.

"The azimuth is reckoned from the south point as zero in the direction of west, north, and east successively—*i. e.*, 90° means due west, 270° due east, etc.

"The convergence of the meridians is 44½ seconds for each mile. The bearings going west, or back azimuths, are therefore in each case three-fourths of a minute greater than the eastern or direct azimuths.

"Mile.	Azimuth.	Back azimuth.	Distance.	
			Metres.	*Feet.*
40 to 41	268° 57¾′	88° 58½′	1,610.1	5,282½
41 to 42	268 58½	88 59¼	1,610.1	5,282½
42 to 43	269 20½	89 21¼	1,610.1	5,282½
43 to 44	269 58¾	89 59½	1,603.8	5,261½
44 to 45	269 52¾	89 53½	1,616.7	5,304
45 to 46	269 51	89 51¾	1,610.2	5,283
46 to 47	269 11	89 11¾	1,610.1	5,282½
47 to 48	268 55½	88 56¼	1,610.1	5,282½
48 to 49	268 56¼	88 57	1,612.7	5,291
49 to 50	269 16¾	89 17½	1,608.3	5,276½
50 to 51	269 04½	89 05¼	1,613.3	5,293
51 to 52	268 10¼	88 11	1,595.8	5,235½
52 to 53	268 17¾	88 18½	1,626.1	5,335
53 to 54	268 18½	88 19¼	1,613.2	5,292½
54 to 55	268 57½	88 58¼	1,611.5	5,287
55 to 56	269 33	89 33¾	1,611.5	5,287
56 to 57	269 33¾	89 34½	1,611.5	5,287
57 to 58	270 48	90 48¾	1,612.0	5,289
58 to 59	270 36¾	90 37½	1,613.8	5,294½
59 to 60	270 39	90 39¾	1,613.8	5,294½

*141 * *"Offsets from Base Line.*

	M.			M.	
"Mon't No. 40,	3.3 = 11	ft. N.	"Mon't No. 51,	23.7 = 78	ft. S.
" " 41,	8.8 = 29	" "	" " 52,	7.6 = 25	" N.
" " 42,	14.3 = 47	" "	" " 53,	36.2 = 119	" "
" " 43,	9.8 = 32	" "	" " 54,	64.8 = 212½	" "
" " 44,	12.1 = 40	" S.	" " 55,	75.4 = 247	" "
" " 45,	31.0 = 102	" "	" " 56,	69.5 = 228	" "
" " 46,	48.7 = 160	" "	" " 57,	63.7 = 209	" "
" " 47,	47.3 = 155	" "	" " 58,	23.4 = 77	" "
" " 48,	38.3 = 125½	" "	" " 59,	11.3 = 37	" S.
" " 49,	29.4 = 96½	" "	" " 60,	46.6 = 153	" "
" " 50,	29.6 = 97	" "			

"Note on the Reduction and Results of the Astronomical Observations at Lineville, Iowa.

"For latitude the observed altitudes of Polaris were reduced by the method and table given on page 534 of the American Ephemeris, with the result:

"Approximate latitude = 40° 34′.6.

"Comparisons of local mean time, obtained by sextant observations of the sun, with railroad time signals, gave the following result:

"Approximate longitude (W. of Greenwich) = 93° 32′.

"For azimuth the observations of Polaris were reduced by the formula

$$\tan A = \frac{\sin t}{\cos \phi \tan \delta - \sin \phi \cos t},$$

in which the letters have the following significations:

A = the azimuth of the star at the instant of observation.
t = the hour angle " " "
δ = the declination " " "
Φ = the latitude of the place.

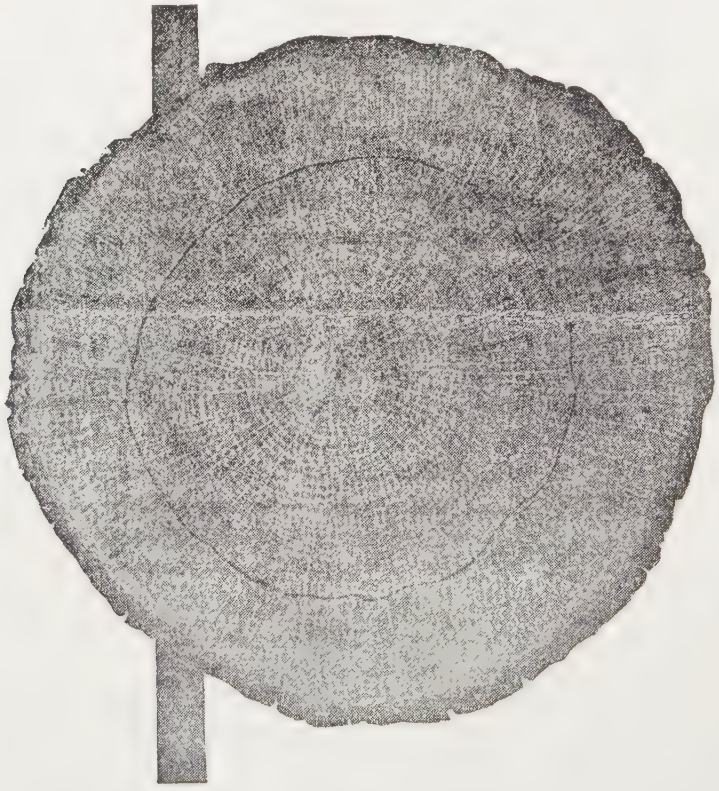
"Resulting azimuth of base line = 89° 21′ 49″ east of north.

"These results transferred to the monuments at each end of this 20-mile section give the following:

		Lat.	Long.	Azimuth.
*142	* 40-mile mon't	40° 34′.4	93° 51′	269° 14′ 49″
	60-mile mon't	40 34 .6	93 28	89 29 40

the azimuth at each point being the bearing of the straight line joining the two points."

"Appendix C.



Photograph of a section of the oak tree at the Fifty-second mile point, supposed to be witness tree in the Iowa-Missouri boundary. The dark line indicates the size of the stem fifty years ago.

*143 * APPENDIX B.

"Account of Expenses Incident to the Relocation and Re-marking the Boundary Line between the States of Missouri and Iowa from the 40th to the 60th Mile Point, under Decree of the Supreme Court of the United States, February 5, 1896.

"Pay of engineers:		
W. C. Hodgkins, (U. S. Geodetic Survey Corps,) 74 days @ $5.00	$370 00	
A. L. Baldwin, (U. S. Geodetic Survey Corps,) 41 days @ $5.00	205 00	
Transportation from Washington, D. C.	77 75	
" to Salina, Kansas	41 14	
Freight on instruments returned to Washington	8 32	
		702 21
Pay of one assistant (14 days @ $2.50) and laborers		190 50
Subsistence of parties in field		421 75
Hire of teams and drivers and feed for teams		342 25
Paid for eighteen granite monuments in place		922 00
Miscellaneous expenses paid, (telegrams, township plats, signal materials, clerical work and typewriting, repairs of instruments, storage, &c., &c.)		171 60
Advertising, Missouri and Iowa		133 30
Commissioners:		
James Harding, comm. for Missouri, 78 days @ $10.00	780 00	
James Harding, travelling expenses	161 85	
		941 85
Peter A. Dey, comm. for Iowa, 60 days @ $10.00	600 00	
Peter A. Dey, travelling expenses	189 47	
		789 47
Dwight C. Morgan, comm. 46 days @ $10.00	460 00	
Dwight C. Morgan, travelling expenses	198 63	
		658 63
Total		$5,273 56"

*144 * And it is ordered, adjudged and decreed that the boundary line between said States of Missouri and Iowa in controversy herein be, and it is hereby, established and declared to be, as delineated and set forth in said report.

It is further ordered, adjudged and decreed that the compensation and expenses of the commissioners and the expenditures attendant upon the discharge of their duties be, and they are hereby, allowed at the sum of five thousand two hundred and seventy-three dollars and fifty-six cents ($5,273.56), in accordance with their report as confirmed as aforesaid, and that said charges and expenses with the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further

Ordered, adjudged and decreed that the clerk of this court forthwith transmit to the Chief Magistrates of the States of Missouri and Iowa copies of this decree, duly authenticated under the seal of this court.

State of Indiana v. State of Kentucky.

Supreme Court of the United States, 1897.

[167 *United States*, 270.]

The report of the commissioners for permanently marking the boundary line established between the States of Indiana and Kentucky by the decree of May 18, 1896, 163 U. S. 520, is approved by this court.

Mr. Chief Justice Fuller announced the decree of the court.

This cause coming on to be heard on the report of Amos Stickney, Gustavus V. Menzies and Gaston M. Alves, commissioners, hereinbefore appointed to ascertain and run the boundary line between the States of Kentucky and Indiana, and continued by the decree of this court herein entered May 18, 1896, for the purpose of permanently marking said line as set forth in their then report which was approved by this court on that date, and to make report thereon to this court; which report now made is as follows:

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States:

The undersigned Commissioners, appointed by this honorable court, in the above-entitled cause, respectfully report, that, pursuant to the order made in said cause at the October term, 1895, continuing the commission for the purpose therein stated, they gave notice for bids for the stone monuments and iron posts and setting of the same to mark the boundary line as established by the order of this court.

*271 The commission met at the custom house in the city of Evansville, Indiana, on the * ninth day of April, 1897, and received and opened the bids for the above-named material and work. The casting of the iron posts was let to the Heilman Machine Works of Evansville, Indiana, for the sum of one hundred and twenty dollars ($120.00), it being the lowest and best bidder; the making and setting in place of the three stone monuments was let to F. J. Scholz & Son of Evansville, Indiana, for the sum of two hundred and forty-five dollars ($245.00), said firm being the lowest and best bidder; the setting of the sixteen iron posts was let to Eb. Cross of Evansville, Indiana, for the sum of one hundred and ninety-seven dollars ($197.00), he being the lowest and best bidder. That contracts were made with each of said parties and bonds taken for the honest and faithful performance of the contracts. That on the 7th day of May, 1897, after the engineer in charge of the work had reported that the monuments had been erected, and posts placed in position, in conformity to the order of the court, and the location of the established line of each monument and post had been verified by accurate observations and measurements, the Commission, accompanied by the engineer, visited the line, and by observations and measurements satisfied themselves of the accuracy of locations, and that the work of making and placing the boundary marks had been well done, and in accordance with the order of the court.

We herewith attach, as a part of this report, the report of the engineer in charge of the work. Also a statement of expenses incurred and compensation of the Commissioners since making the former report, which we recommend be adjudged as costs equally against the parties to the suit. We further recommend

that upon the confirmation of this report, a certified copy of the same be sent to the Governor of the State of Indiana, and one to the Governor of the Commonwealth of Kentucky.

Your Commissioners therefore pray that this report be confirmed and they be discharged.

AMOS STICKNEY,
GUSTAVUS V. MENZIES,
GASTON M. ALVES,
Commissioners.

*272 * *To the Honorable Commissioners on the Indiana and Kentucky Boundary Line at Green River Island.*

GENTLEMEN: In accordance with your instructions, I made plans and detailed drawings for stone and iron monuments, to permanently mark the line between the States of Indiana and Kentucky at Green River Island, to replace the cedar posts as placed on it during the winter of 1896. Upon your approval of the plans and letting the contracts for the monuments, I proceeded to verify the line and angles to satisfy myself that no post had been moved. On the completion of the monuments I superintended the work of setting them.

The three monuments of stone are of sawed Green River limestone, 18 inches in cross section and 6 feet in length. At the starting point on the section line between sections 14 and 15, town 7 south, range 10 west, the monument has the word "Initial" on the side next section 14, on the north side the word "Indiana," and on the south side the word "Kentucky" cut horizontally in the stone near the top, in Egyptian letters.

Near the midway distance along the line, and near the line between sections 8 and 9, the second stone monument is set, with the word "Indiana" cut on the northerly side, and the word "Kentucky" cut on the southerly side, similar to the first monument.

At the terminal point going down the Ohio River, the third stone monument is placed. The word "Indiana" is cut on the northeasterly side, the word "Kentucky" on the southwesterly side, and the word "Terminal" on the northwesterly side in the same style as the first monument.

For each of these monuments there was an excavation made six feet square and four feet deep, in the bottom of which one foot in thickness of concrete was placed and well rammed. On this the stone was placed on end and filled around with concrete, well rammed to the surface of the ground, leaving three feet of stone above the ground.

At each of the 16 intermediate angles, iron monuments were placed. These are of cast iron, round, six inches in cross section, the top closed and a square pedestal cast on the lower end, the casting being three quarters of an inch
*273 thick. The * word "Indiana" on the one side and the word "Kentucky" on the other, were cast in raised letters, the words reading downward.

An excavation was made for each of these, three feet square and three and one-half feet deep, and six inches of concrete well rammed in the bottom, on which the post was set and filled around with concrete to the surface of the ground, leaving three feet above ground. In four places where silt had accumulated rapidly on account of a depression in the ground, the excavation was made more

shallow, but in each case the concrete bed is three and one-half feet in depth, and the earth banked around it to protect the concrete.

Great care was taken in having centres cut in each monument, and placing them on the exact angle point on the line as originally located.

Every monument was set and completed under my own personal supervision.

Respectfully submitted,

C. C. GENUNG, *C. E.*

EVANSVILLE, IND., *May 5th,* 1897.

Statement of expenses incurred and compensation of the Commissioners since making former report.

C. C. Genung, Civil Engineer.—Services of himself and assistants, making plans, specifications, writing contracts, verifying lines, angles and points on boundary line; laying out and superintending work, expenses of teams for self and Commissioners at various times for supervising and inspecting work		$195 50
Keller Printing Company, for printing and typewriting		12 50
Heilman Machine Works, 16 iron posts		120 00
F. J. Scholz & Son, 3 stone monuments, placed		245 00
Eb. Cross, placing 16 iron posts in concrete		197 00
Expenses of Lt.-Col. Amos Stickney, Commissioner	$34 50	
Services as member of commission	100 00	
		134 50
Forward		$904 50
*274 * *Brought forward*		$904 50
Expenses of Gustavus V. Menzies, Commissioner	10 00	
Services as member of commission	100 00	
		110 00
Expenses of Gaston M. Alves, Commissioner	7 50	
Services as member of commission	100 00	
		107 50
Total		$1122 00

It is ordered, adjudged and decreed that their said report this day filed be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the compensation of the commissioners and expenses attendant upon the discharge of their duties in permanently marking said line as directed by the decree of May 18, 1896, *be, and the same are hereby, allowed the sum of one thousand one hundred and twenty-two dollars* ($1122), *in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.*

And it is further ordered, adjudged and decreed that the clerk of this court do forthwith transmit to the Chief Magistrates of the States of Kentucky and Indiana copies of this decree, duly authenticated, under the seal of this court.

State of Louisiana v. State of Texas.

Supreme Court of the United States, 1900.

[176 *United States*, 1.]

The bill of complaint on the part of Louisiana against Texas, alleged that the State of Texas had granted to its Governor and its Health Officer extensive powers over the establishment and maintenance of quarantines over infectious or contagious diseases; that this power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas which were rivals of New Orleans; and it prayed for a decree that "neither the State of Texas, nor her Governor, nor her Health Officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce against interstate commerce, between the State of Louisiana, or any part thereof, and the State of Texas, an absolute embargo, prohibiting the movement and conduct of said commerce, or to make, declare and enforce against places infected with yellow fever or other infectious diseases in the State of Louisiana discriminative quarantine rules or regulations, affecting interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, different from and more burdensome than the quarantine rules and regulations affecting interstate or foreign commerce between the State of Texas and other States and countries infected with yellow fever and other infectious diseases;" and the bill asked for an injunction, restraining the Texas officials from enforcing the Texas laws in the manner in which they were enforced. *Held*:

*2 * (1) That in order to maintain jurisdiction of the bill it must appear that the controversy to be determined was a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in vindication of the grievances of particular individuals;

(2) That the gravamen of this bill was not a special and peculiar injury, such as would sustain an action by a private person, but that the State of Louisiana presented herself in the attitude of *parens patriæ*, trustee, guardian or representative of all her citizens;

(3) That the bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution;

(4) That the court was unable to hold that the bill could be maintained as presenting a case of controversy between a State and citizens of another State;

(5) That the bill could not be maintained as against the health officer alone, on the theory that his conduct was in violation of or in excess of a valid law of the State.

Mr. Justice White concurred in the result. Mr. Justice Harlan concurred in the result, but dissented from some of the propositions contained in the opinion of the court: as did also Mr. Justice Brown.

The State of Louisiana by her Governor applied to this court for leave to file a bill of complaint against the State of Texas, her Governor and her health officer. Argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs.

The bill alleged: "That the city of New Orleans, one of the great commercial cities of this republic, and the second export city of this continent, containing

about two hundred and seventy-five thousand inhabitants, many of whom are largely engaged in interstate commerce with the inhabitants of the State of Texas, is situated within the territory of your orator; that said city contains nearly one fourth of all the inhabitants of your orator, and the assessed values of her property are more than one half the assessed values of the whole State, and she contributes by taxes and licenses more than five eighths of your orator's revenue.

*3 * "The two lines of railroad, the Southern Pacific and the Texas and Pacific, run directly from the city of New Orleans through the States of Louisiana and Texas, and into the States and Territories of the United States and of Mexico, beyond the State of Texas, with the inhabitants of which States and Territories the citizens of New Orleans are also engaged in interstate and foreign commerce, such commerce largely following the lines of said railroads and their many connections.

"That the State of Texas, by her Revised Civil Statutes, adopted at the regular session of the Twenty-fourth Legislature, held in the year 1895, being Title XCII thereof, has granted to her Governor and her health officer extensive powers over the establishment and maintenance of quarantines against infectious or contagious diseases, with authority to make rules and regulations for the detention of vessels, persons and property coming into the State from places infected, or deemed to be infected, with such diseases.

"That Joseph D. Sayers, a citizen of the State of Texas, is now, and has been for some time past, Governor of said State.

"That William F. Blunt, a citizen of the State of Texas, is now, and has been for some time past, the state health officer of the State of Texas.

"That the ports of said State, situated on the Gulf coast, are engaged in commerce with the ports of Mexico, Central and South America and Cuba, known to be permanently infected with yellow fever; said commerce being largely competitive with similar commerce coming to the port of New Orleans.

"That on the 1st day of March, 1899, Joseph D. Sayers, Governor of the State of Texas, under the provisions of the said laws, issued his proclamation establishing quarantine on the Gulf coast and Rio Grande border against all places, persons or things coming from places infected by yellow fever, etc., a copy of which proclamation is hereto annexed and made part of this bill and marked Exhibit 'A.'

"That the rules and regulations established in said quarantine proclamation permit trade and commerce between such infected ports and the State of

*4 Texas, and provide for the * fumigation and reasonable detention of ships and cargoes from infected ports.

"That on or about the 31st day of August, 1899, a case of yellow fever was officially declared to exist in the city of New Orleans, in a part of the city several miles away from the commercial part thereof, and from that time to this several other sporadic cases have been reported in similar parts of the city.

"That as soon as the first case was reported the said William F. Blunt, Health Officer of the State of Texas, claiming to act under the provisions of Article 4324 of the Revised Civil Statutes, under the pretence of establishing a quarantine, placed an embargo on all interstate commerce between the city of New Orleans and the State of Texas, absolutely prohibiting all common carriers entering the State of Texas from bringing into the State any freight or passengers or even the

mails of the United States, coming from the city of New Orleans, and to enforce these orders he immediately placed, and now maintains, armed guards, acting under the authority of the State of Texas, on all the lines of travel from the State of Louisiana into the State of Texas, with instructions to enforce the embargo declared by him *vi et armis,* which instructions these armed guards are carrying out to the letter; that about six days later he modified his order so as to permit the Government of the United States to carry and deliver the mails; and also modified his order so as to permit persons and their baggage to enter the State of Texas, after ten days' detention at the quarantine detention camps, established by him, and after fumigation of their baggage; but that he now maintains, and announces his intention to maintain indefinitely, his absolute prohibition of all interstate commerce between the city of New Orleans and the State of Texas; that he has refused to permit the introduction of sulphuric acid in iron drums, unpacked hardware, machinery and other articles coming from localities in the city of New Orleans, far removed from the places where the sporadic cases of fever have occurred, and which by their nature are concededly incapable of conveying
*5 infection; that he had established * no system of classification or inspection of the articles of interstate commerce, coming from the city of New Orleans, to determine whether they are, or may be, infected, or whether they are capable, or not, of conveying infection, no period of detention for such articles, no place or method of disinfection thereof; his only method being absolute and unconditional prohibition of such interstate commerce; that it is a notorious fact, and well known to said Blunt, that all of the interstate commerce between New Orleans and Texas is carried on by railroads, and none by water communication between the port of New Orleans and the Texas ports, and that the effect of his orders is to destroy all such commerce, to take away the trade of the merchants and business men of the city of New Orleans, and to transfer that trade to rival business cities in the State of Texas.

"That while Joseph D. Sayers, Governor of the State of Texas, has issued no formal proclamation of quarantine, as provided by law, to wit, Art. 4324 of the Revised Civil Statutes, defining the rules and regulations of such quarantine so declared by said Blunt, your orator charges that the rules and regulations established by said Blunt have the full force of law until modified or changed by the proclamation of the Governor, and that the Governor knows all these facts and approves and adopts the same, and permits these rules and regulations to stand and to be executed in full force and effect as established by said Blunt.

"Now your orator recognizes the right and power of the State of Texas and the public officials thereof to take prudent and reasonable measures to protect the people of said State from infection, to establish quarantine and reasonable inspection laws, but your orator denies that said State, or its officials, acting under its laws, under the cover of exercising its police powers, can prohibit or so burden interstate commerce as to make such commerce impossible.

"Your orator avers that it is a recognized and acknowledged fact by all the sanitariums and health officials of the various States exposed to infection by yellow fever and by the health officials of the United States, and by all scientific
*6 * students of infection and sanitation, that commerce can be conducted between infected and non-infected points, with small inconvenience and without any danger of infection, by classifying the articles of commerce and by pur-

suing certain well-recognized rules and precautions with reference to the articles and vehicles of commerce.

"That after the yellow fever outbreak of 1897 a quarantine convention was held in Mobile, Ala., and, on the advice of that convention, a conference of the health officials of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Missouri and the United States Marine Hospital Service met at Atlanta, Ga., and formulated such regulations which were adopted by the Boards of Health of all said States, and, as subsequently revised, are now in full force and effect between the said States; that additional experience having been gained by the reappearance of yellow fever in the fall of 1898, a revising conference was held in the city of New Orleans on February 9, 1899, at which conference the Atlanta regulations were in some respects modified. A copy of the said regulations, original and as modified, are hereto annexed and made part of this bill and marked Exhibit 'B.'

"Your orator avers that said William F. Blunt, or his predecessor in office, was health officer of the State of Texas at the time these conferences were held, that he and his predecessor in office refused or neglected to attend them in person or by representative, and he has continually refused to adopt the Atlanta regulations, or any of them, or any regulations similar to them, and insists, as his predecessor in office insisted, upon being a law to himself, and upon using no means of dealing with yellow fever infection in the city of New Orleans, or elsewhere in the State of Louisiana, real or imaginary, except an absolute embargo upon interstate commerce to be established at his pleasure and to last as long as he chooses to maintain it.

"That in pursuance of this policy, in the year 1897, his predecessor in office established a similar embargo on interstate commerce between New Orleans and other points in Louisiana, supposed by him to be infected, and the State of
*7 * Texas, on the 10th day of September; and refused to remove or to modify said embargo until the —— day of December, 1897, during which period he even refused to permit railroad cars that had been in the city of New Orleans to enter or even pass through the State of Texas, on their way to the countries, States or Territories beyond.

"That in pursuance of the same policy, in the year 1898, the said William F. Blunt, health officer, and the Governor of the State of Texas, established a similar embargo on all interstate commerce between the State of Louisiana and the State of Texas, on the 18th day of September, and refused to remove or modify the same until the 1st day of November.

"That in pursuance of the same policy, the said William F. Blunt, because a single case of yellow fever was declared in the city of New Orleans, did on May 30, 1899, establish a similar embargo on interstate commerce between the city of New Orleans and the State of Texas, which he refused to modify or to remove until June 9, 1899, and then only under great pressure, although he was advised on June 2, 1899, by the representatives of the health authorities of the States of Alabama and Mississippi, of the United States Marine Hospital Service, and of the Louisiana state board of health, who had been for some days in the city of New Orleans, making a personal inspection of her sanitary and health conditions, that they deemed it 'unnecessary and unwise for any State or city to quarantine against New Orleans under present conditions.'

"Your orator avers that the State of Texas, her Governor and her health officer, as shown by the rules and regulations established by them in the proclamation aforesaid for the quarantine on the Gulf coast, admit the truthfulness of the claim of your orator that commerce can be carried on with infected places and ports, under reasonable rules and regulations as to inspection, fumigation and detention, and admit that there are articles of commerce incapable of conveying infection, and actually permit such commerce in all articles to be so carried on to the advantage and benefit of the commerce of the ports of Texas and her merchants engaged in commerce in said ports.

*8 * "Your orator avers that the effect of the embargoes imposed by the State of Texas upon the commerce of the city of New Orleans with Texas is to build up and benefit the commerce of the city of Galveston, in Texas, and the commerce of other cities in Texas, all of which are commercial rivals of the city of New Orleans for the large commerce of the State of Texas and the adjoining States and Territories.

"That prior to the embargoes aforesaid of the years 1897 and 1898 the city of New Orleans was the greatest cotton exporting port of the United States, and a very large portion of the cotton grown in Texas was exported through the port of New Orleans; for instance, for the season of 1894–5 more than 31 per cent thereof; for the season of 1895–6 more than 30 per cent thereof; for the season 1896–7, 25 per cent thereof.

"That as consequence of the two trade embargoes aforesaid the percentage of the Texas cotton crop exported through the port of New Orleans for the season of 1897–8 was only 19 per cent; and for the season of 1898–9 was only 15 per cent; and for the season of 1898–9, ending September 1, 1899, the city of Galveston handled more export cotton than the city of New Orleans.

"That the effect of said embargoes is all the more disastrous to the commerce of your orator, and of her cities and towns, because declared and made operative during the months of September, October, November and the early part of December, the period of the greatest activity and the largest movement of commerce among the States of the South, and between the State of Louisiana, the city of New Orleans and the State of Texas.

"Now your orator avers that in view of the unreasonable, harsh, prohibitive and discriminating character of the pretended quarantines, declared and maintained by the State of Texas and her health officer, against the city of New Orleans and other localities in the State of Louisiana, is nothing less than a commercial war declared against your orator, her ports, cities and citizens; not for the *bona fide* purpose of protecting the health of the State of Texas, but for

*9 the purpose of increasing * the trade and commerce of the State of Texas and of her ports, cities and citizens, to the great damage and injury of your orator and her citizens; that such embargoes on interstate commerce injure and impoverish your orator's citizens, reduce the value of her taxable property, diminish her revenues, retard immigration, reduce the value of her public lands, and deprive her citizens of their rights and privileges as citizens of the United States.

"Your orator avers that the embargo upon interstate commerce between the city of New Orleans, in the State of Louisiana, and the State of Texas, established by said Blunt on or about the first day of September, 1899, and now maintained by him and the other officials of the State of Texas, will be continued by them

for an indefinite period, to the great damage and injury of your orator's ports, commerce and revenues, and to the commerce of her citizens and to the rights of her citizens under the Constitution of the United States, unless they be enjoined and restrained by order of this court.

"Your orator avers that, from the past conduct of the State of Texas, and of her Governors and health officers, your orator is justified in averring and charging, and does aver and charge, that it is the fixed purpose and intention of the said State, and of her Governors and health officers, whenever in the future any case of yellow fever, or other infectious disease, occurs in any parish, city or town within your orator's borders, to immediately declare, set up and maintain an absolute prohibition of interstate commerce between said supposed infected parish, city or town, and the State of Texas, and to keep the same in force during the pleasure of such officials, or to make and establish discriminative rules and regulations covering quarantines on such interstate commerce, different from and more burdensome than the rules and regulations concerning quarantines on interstate commerce with other States and foreign commerce with countries also infected with yellow fever, or other infectious diseases, and thereby to injure and oppress your orator and her citizens.

*10 * "Now your orator avers that the absolute prohibition * against the movement and operation of interstate commerce between the city of New Orleans and the inhabitants thereof, and the State of Texas and the inhabitants thereof, established by said William F. Blunt, health officer of the State of Texas and now maintained and enforced by him, the Governor and the other officials of the State of Texas, is in direct contravention of the provisions of the Constitution of the United States, and particularly of that clause thereof which grants to the Congress power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, and is null, void and of no effect, and the continuance thereof ought to be restrained by the order of this honorable court.

"Your orator further avers that the various cities, counties and towns in the State of Texas have authority, under the statutes aforesaid, to establish quarantines, but all such quarantines are by statute subordinate to, subject to and regulated by the rules and regulations prescribed by the Governor and the state health officer, and that, therefore, all such quarantines are dirigible and controllable by the Governor and the health officer of Texas.

"Your orator is informed and believes and so charges that it is the intention of certain counties, cities and towns along the lines of the railroads aforesaid, in case your honors should restrain the operation of the embargo established as aforesaid by William F. Blunt, state health officer, to severally establish the same embargo on their own account, and to prevent the passage of trains on said railroads carrying interstate commerce from the city of New Orleans through them to other parts of the State of Texas and to other States, and to so hinder, obstruct and delay the transportation of said commerce along the lines of railroad running through their limits as to render its conduct impossible; that in case it should be considered that the public authorities of such counties, towns and cities are not personally bound by any order your honors may issue in this cause, and in case they should attempt to carry out any such illegal plan, your orator reserves the right hereafter to make such officials parties to this bill, so as to subject them to the control of the court."

*11 * The bill then prayed for answers under oath; that the court decree "that neither the State of Texas, nor her Governor, nor her health officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce against interstate commerce, between the State of Louisiana, or any part thereof, and the State of Texas, an absolute embargo, prohibiting the movement and conduct of said commerce, or to make, declare and enforce against places infected with yellow fever, or other infectious diseases, in the State of Louisiana, discriminative quarantine rules and regulations affecting interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, different from and more burdensome than the quarantine rules and regulations affecting interstate or foreign commerce between the State of Texas and other States and countries infected with yellow fever, or other infectious diseases, and that the embargo and prohibition upon interstate commerce between the city of New Orleans and the State of Texas, declared by William F. Blunt, health officer of the State of Texas, on or about the 1st day of September, 1899, and now maintained and enforced by the State of Texas, under the guise of a quarantine against yellow fever, is contrary to the Constitution of the United States, null, void and of no effect and validity;" that a preliminary injunction be issued "prohibiting, enjoining and restraining the State of Texas, and all of her officers and public officials, and prohibiting, enjoining and restraining Joseph D. Sayers, Governor of the State of Texas, and William F. Blunt, health officer of the State of Texas, their successors in office, and all of their subordinates, assistants, agents and employés, from establishing, maintaining and enforcing, or attempting to establish, maintain and enforce, under the guise of a quarantine against yellow fever, any embargo or absolute prohibition upon interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, or from establishing, maintaining and enforcing, or attempting to establish, maintain and enforce against interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, discriminative and
*12 burdensome quarantine * regulations other and different from the regulations established by such authorities against foreign and interstate commerce between the State of Texas and other countries and States infected with yellow fever, or other infectious diseases, and particularly enjoining, prohibiting and restraining them, and each of them, from maintaining or enforcing, directly or indirectly, the prohibitory embargo on interstate commerce established against the city of New Orleans on or about the first day of September, 1899, under the guise and pretense of a quarantine regulation;" and that such injunction be made perpetual on final hearing; for costs; and for general relief.

The demurrer assigned the following causes:

"First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of said bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the States of Louisiana and Texas.

"Second. Because the allegations of said bill show that the only issues presented by said bill arise between the State of Texas or her officers and certain persons in the city of New Orleans, in the State of Louisiana, who are engaged in interstate commerce, and which do not in any manner concern the State of Louisiana as a corporate body or State.

"Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the State of Louisiana, said State is in effect loaning its name to said individuals and is only a nominal party, the real parties at interest being said individuals in the said city of New Orleans who are engaged in interstate commerce.

"Fourth. Because it appears from the face of said bill that the State of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said State possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose.

*13 * "Fifth. Because it appears from the face of said bill that no property right of the State of Louisiana is in any manner affected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

Mr. Milton J. Cunningham, Mr. Edgar H. Farrar, Mr. Benjamin F. Jonas, Mr. Ernest B. Krutschnitt, and *Mr. E. Howard McCaleb* for the State of Louisiana.

Mr. Thomas S. Smith and *Mr. Robert H. Ward* for the State of Texas, and others.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The ninth of the Articles of Confederation of 1778 provided that the Congress should be "the last resort on appeal in all disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction or any other cause whatever," the authority to be exercised through a tribunal to be created by the Congress as prescribed, and whose judgment should be final and conclusive; and also that "all controversies concerning the private right of soil claimed under different grants of two or more States" should be determined in the same manner.

In the Constitutional Convention, the Committee of Detail, composed of Rutledge, Randolph, Gorham, Ellsworth and Wilson, to which the resolutions arrived at by the Convention and sundry propositions had been referred, reported on the sixth of August, A.D. 1787, a draft of a Constitution, consisting of twenty-three articles.

The second section of the ninth article provided that as to "all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory," the Senate should have power to designate a special tribunal to finally determine the same by its judgment; and by the third section, "all controversies concerning lands claimed under different grants of two or more States" were to be similarly determined.

*14 * The third section of the proposed eleventh article provided, among other things, that the jurisdiction of the Supreme Court should extend "to controversies between two or more States, except such as shall regard territory or

jurisdiction; between a State and citizens of another State; between citizens of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."

On the twenty-fifth of August Mr. Rutledge said in respect to sections two and three of article nine: "This provision for deciding controversies between the States was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established;" and on his motion the sections were stricken out.

The words "between citizens of the same State claiming lands under grants of different States" were subsequently inserted in the third section of the eleventh article, and the words "except such as shall regard territory or jurisdiction" omitted. 1 Elliot, 223, 224, 261, 262, 267, 270; 5 Elliot, 471; Meigs on Growth of the Constitution, 244, 249.

Clauses 1 and 2 of the second section of Article III of the Constitution as finally adopted read:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

*15 * The reference we have made to the derivation of the words "controversies betwen two or more States" manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over "territory or jurisdiction"; for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.

Undoubtedly, as remarked by Mr. Justice Bradley in *Hans* v. *Louisiana,* 134 U. S. 1, 15, the Constitution made some things "justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which on the settled principles of public law are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 288, 289, and cases there cited."

By the Judiciary Act of 1789 the judicial system was organized and the powers of the different courts defined. Its thirteenth section, carried forward as § 687 of the Revised Statutes, provided "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

The language of the second clause of the second section of Article III, "in all cases in which a State shall be a party," means in all the enumerated cases in which a State shall be a party, and this is stated expressly when the clause
*16 speaks * of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. *California* v. *Southern Pacific Railroad Company,* 157 U. S. 229, 259; *United States* v. *Texas,* 143 U. S. 621. And by the Constitution and according to the statue, the original jurisdiction of this court is exclusive over suits between States, though not exclusive over those between a State and citizens of another State.

On the 8th of January, 1798, the Eleventh Amendment was ratified, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Referring to this Amendment, Mr. Chief Justice Waite, in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana,* 108 U. S. 76, 91, said: "The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and in our opinion, one State cannot create a controversy with another State within the meaning of that term as used in the judicial clauses of the Constitution by assuming the prosecution of debts owing by other States to its citizens."

In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals.

By the Constitution, the States are forbidden to "enter into any treaty, alliance or confederation; grant letters of marque and reprisal;" or, without the consent of Congress, "keep troops, or ships of war in time of peace, enter into any
*17 agreement * or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Art. 1, sec. 10.

Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement. As pointed out by Mr. Justice Field in *Virginia* v. *Tennessee,* 148 U. S. 503, 519, there are many matters on which the different States may agree that can in no respect concern the United States, while there are other compacts or agreements to which the prohibition of the Constitution applies. And as to this, he quotes from Mr. Justice Story as follows: "Story,

in his Commentaries, (§ 1403,) referring to a previous part of the same section of the Constitution in which the clause in question appears, observed that its language 'may be more plausibly interpreted from the terms used, "treaty, alliance or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;' and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in lands situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the National Government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.'" But it was also there ruled

*18 that where the consent of Congress was requisite, it might be given subsequently or might be * implied from subsequent action of Congress itself toward the two States.

In the absence of agreement it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a State in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives.

As might be expected in view of the nature of the jurisdiction, the cases are few in which the aid of the court has been sought in "controversies between two or more States." They are cited in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, and are chiefly controversies as to boundaries.

In *South Carolina* v. *Georgia,* 93 U. S. 4, 14, a bill was filed for an injunction against the State of Georgia, the Secretary of War and others, from "obstructing or interrupting" the navigation of the Savannah River in violation of the compact entered into between the States of South Carolina and Georgia on the 24th day of April, 1787. The bill was dismissed because no unlawful obstruction of navigation was proved, but the question was expressly reserved whether "a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, and such as would enable a private person to maintain a similar action in another court."

So in *Wisconsin* v. *Duluth,* 96 U. S. 379, 382, the contention that the court could "take cognizance of no question which concerns alone the rights of a State in her political or sovereign character; that to sustain the suit she must have some proprietary interest which is affected by the defendant," was not passed upon.

*19 * In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 519, the court treated the suit as brought to protect the property of the State of Pennsylvania.

But in *Debs, Petitioner,* 158 U. S. 564, involving a case in the Circuit Court in which the United States had sought relief by injunction, it was observed: "That while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties."

It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriæ,* trustee, guardian or representative of all her citizens.

She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained.

*20 * By Title XCII of the Revised Statutes of the State of Texas of 1895, "The Governor is empowered to issue his proclamation declaring quarantine on the coast, or elsewhere within this State, whenever in his judgment quarantine may become necessary, and such quarantine may continue for any length of time as in the judgment of the Governor the safety and security of the people may require." It is made the Governor's duty "to select and appoint, by and with the advice and consent of the Senate, from the most skillful physicians of the State of Texas, one physician who shall be known as health officer of the State, and shall from previous and active practice be familiar with yellow fever and pledged to the importance of both quarantine and sanitation." It was also provided that "whenever the Governor has reason to believe that the State of Texas is threatened at any point or place on the coast, border or elsewhere within the State with the introduction or dissemination of yellow fever contagion, or any other infectious and contagious disease that can and should, in the opinion of the state health officer, be guarded against by state quarantine, he shall, by proclamation, immediately declare said quarantine against any and all such places, and direct the state health officer to promptly establish and enforce the restrictions and conditions imposed and indicated by said quarantine proclamation, and when from any cause the Governor cannot act, and the exigencies of the threatened danger

require immediate action, the state health officer is empowered to declare quarantine as prescribed in this article, and maintain the same until the Governor shall officially take such action as he may see proper." And further, that the laws in regard to state quarantine should remain and be in full force and operation on the coast or elsewhere in the State as the Governor or health officer might direct, and be enforced as heretofore, "with such additional changes in station and general management as the Governor may think proper." Differences and disputes in regard to local quarantine were to be determined by the Governor, and all county and municipal quarantine was made subordinate to such rules and regulations as might be prescribed by the Governor or state health officer. It
*21 * was made the duty of any county, town or city authority on the coast or elsewhere in the State, on the promulgation of the Governor's proclamation declaring quarantine, to provide suitable stations and employ competent physicians as health officers subject to the approval of the Governor, and in case of the failure of the authorities to do so, the Governor was empowered to act. Provision was made for the detention of persons, and vessels, and for the disinfection of vessels and their cargoes and passengers arriving at the ports of Texas from any infected port or district, and for rules and regulations in regard thereto, "the object of such rules and regulations being to provide safety for the public health of the State without unnecessary restriction upon commerce and travel."

It is not charged that this statute is invalid nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government.

In *Morgan Steamship Company* v. *Louisiana Board of Health,* 118 U. S. 455, this was so held, and Mr. Justice Miller, delivering the opinion of the court, said: "The matter is one in which the rules that should govern it may in many respects be different in different localities and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, one hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." Hence, even if Congress had remained silent on the subject, it would not have followed that the exercise of the police power of
*22 the State in this regard, although necessarily operating on interstate * commerce, would be therefore invalid. Although from the nature and subjects of the power of regulating commerce it must be ordinarily exercised by the National Government exclusively, this has not been held to be so where in relation to the particular subject-matter different rules might be suitable in different localities. At the same time, Congress could by affirmative action displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation.

The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed

and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the Governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement, whose breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves commiting one State to a distinct collision with a sister State.

In our judgment this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health
*23 officer as to make it her own, or * from which it necessarily follows that the two States are in controversy within the meaning of the Constitution.

Finally we are unable to hold that the bill may be maintained as presenting a case of controversy "between a State and citizens of another State."

Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States, and such a controversy, as we have said, is not presented.

Demurrer sustained and bill dismissed.

Mr. Justice White concurred in the result.

Mr. Justice Harlan concurring.

Taking the allegations of the bill to be true—as upon demurrer must be done —this suit cannot be regarded as one relating only to local regulations that incidentally affect interstate commerce and which the State may adopt and maintain in the absence of national regulations on the subject. On the contrary, if the allegations of the bill be true, the Texas authorities have gone beyond the necessities of the situation and established a quarantine system that is absolutely subversive of all commerce between Texas and Louisiana, particularly commerce between Texas and New Orleans. This court has often declared that the States have the power to protect the health of their people by police regulations directed

*24 to that * end, and that regulations of that character are not to be disregarded because they may indirectly or incidentally affect interstate commerce. But when that principle has been announced it has always been said that the police power of a State cannot be so exerted as to obstruct foreign or interstate commerce beyond the necessity for its exercise, and that the courts must guard vigilantly against needless intrusion upon the field committed to Congress. *Railroad Co.* v. *Husen,* 95 U. S. 465, 470–473; *Hennington* v. *Georgia,* 163 U. S. 299, 313, 318; *Missouri, Kansas and Texas Railway* v. *Haber,* 169 U. S. 613, 628, 630. The present suit proceeds distinctly on the ground that the regulations established by the authorities of Texas under its statute go beyond what is necessary to protect the people of that State against the introduction of infectious diseases and destroy the possibility of any commerce between New Orleans and Texas. Now, if Texas has no right, by its officers, to establish regulations that unreasonably or unnecessarily burden commerce between that State and Louisiana, and if the State of Louisiana is entitled, under the Constitution, to have the validity of such regulations tested in a judicial tribunal, then this court should put the defendants to their answer, and the cause should proceed to a final decree upon its merits.

But I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect. When the Constitution gave this court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining State in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce. The word "con-
*25 versies" in the clauses extending the judicial * powers of the United States to controversies "between two or more States," and to controversies "between a State and citizens of another State," and the word "party" in the clause declaring that this court shall have original jurisdiction of all cases "in which a State shall be party" refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State. The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State, but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this court. If this be not so, we were wrong in *New Hampshire* v. *Louisiana,* 108 U. S. 76, in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State, acquire the right to bring a suit in its name in this court against the debtor State.

I must express my inability to concur in that part of the opinion of the court relating to the clause of the Constitution extending the judicial power of the United States to controversies "between a State and citizens of another State."

In reference to a controversy of that sort the court says that where none exist between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter confided to his discretion and judgment. But how can the Governor of a State be said to have an executive function to disregard the Constitution of the United States? How can his State authorize him to do that? It is one thing to compel the Governor of a State, by judicial order, to take affirmative action upon a designated subject. It is quite a different thing to say that being directly charged with the execution of a statute he may not be restrained by judicial orders from taking such action as he
*26 deems proper, even if what he is doing and proposes to do * is forbidden by the supreme law of the land. His official character gives him no immunity from judicial authority exerted for the protection of the constitutional rights of others against his illegal action. He cannot be invested by his State with any discretion or judgment to violate the Constitution of the United States.

The court also says that it cannot accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would lie with the state authorities, and no refusal to fulfil their duty in that regard is set up; and that it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States. But the important question presented in this case—if the State of Louisiana in its sovereign capacity can sue at all in respect of the matters set out in the bill—is, whether the regulations being enforced by the health officer are in violation of the Constitution of the United States. The opinion of the court will be construed as meaning that even if Louisiana be entitled, in her sovereign capacity, to complain of those regulations as repugnant to the Constitution of the United States, it could not proceed in this court against the defendant health officer, and that its only remedy is to appeal to the authorities of Texas, that is, to the Governor of that State, who has power to control his co-defendant, the health officer, and who has approved the regulations in question. I am not aware of any decision supporting this view. If the regulations in question are in violation of the Constitution of the United States, the defendant health officer, I submit, may, without any previous appeal to the Governor of Texas, be restrained from enforcing them, either at the suit of individuals injuriously affected by their being enforced, or at the suit of Louisiana in its corporate capacity, provided that State could sue at all in respect of such matters.

Although unable to assent to the grounds upon which the court rests
*27 its opinion, I concur in the judgment dismissing * the suit solely upon the ground that the State of Louisiana in its sovereign or corporate capacity cannot sue on account of the matters set out in the bill.

Mr. Justice Brown concurring in the result.

I am not prepared to say that if the State of Texas had placed an embargo upon the entire commerce between Louisiana and Texas, the State of Louisiana would not be sufficiently representative of the great body of her citizens to maintain this bill.

In view of the solicitude which from time immemorial States have manifested for the interest of their own citizens; of the fact that wars are frequently waged by States in vindication of individual rights, of which the last war with England, the opium war of 1840 between Great Britain and China, and the war which is now being carried on in South Africa between Great Britain and the Transvaal Republic, are all notable examples; of the further fact that treaties are entered into for the protection of individual rights, that international tribunals are constantly being established for the settlement of rights of private parties, it would seem a strange anomaly if a State of this Union, which is prohibited by the Constitution from levying war upon another State, could not invoke the authority of this court by suit to raise an embargo which had been established by another State against its citizens and their property.

An embargo, though not an act of war, is frequently resorted to as preliminary to a declaration of war, and may be treated under certain circumstances as a sufficient *casus belli*. The case made by the bill is the extreme one of a total stoppage of all commerce between the most important city in Louisiana and the entire State of Texas; and while I fully agree that resort cannot be had to this court to vindicate the rights of individual citizens, or any particular number of individuals, where a State has assumed to prohibit all kinds of commerce with the chief city of another State, I think her motive for doing so is the proper subject of judicial inquiry.

*28 * It is true that individual citizens, whose rights are seriously affected by a system of non-intercourse, might, perhaps, maintain a bill of this kind; but to make the remedy effective it would be necessary to institute a multiplicity of suits, to carry on a litigation practically against a State in the courts of that State, and to assume the entire pecuniary burden of such litigation, when all the inhabitants of the complaining State are more or less interested in the result.

But the objection to the present bill is that it does not allege the stoppage of all commerce between the two States, but between the city of New Orleans and the State of Texas. The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant.

State of Tennessee v. State of Virginia.

Supreme Court of the United States, 1900.

[177 *United States*, 501.]

A decree is entered, ordering the appointment of commissioners to ascertain, re-trace, remark and reëstablish the boundary line between the States of Virginia and Tennessee, as established by the decree of this court in *Virginia* v. *Tennessee*, 148 U. S. 503, but without authority to run or establish any other or new line.

On the 16th day of April, 1900, the State of Tennessee, having obtained leave so to do, filed its bill of complaint against the State of Virginia, setting forth the result of the suit of *Virginia* v. *Tennessee*, 148 U. S. 503, establishing

the boundary line between the two States; that a subsequent attempt made to have the line run according to the decree in that suit had failed because the power of the court over the original cause had ceased with the expiration of October Term, 1893, *Virginia* v. *Tennessee,* 158 U. S. 267; and asking that the State of Virginia be made a party defendant, and be required to answer the bill, and that, upon the hearing a decree be entered, ordering a re-running of the boundary line as declared in *Virginia* v. *Tennessee,* 148 U. S. 503-528.

On the same 16th day of April, the State of Virginia appeared and filed an answer in which it said that it fully accepted the adjudication of this court in *Virginia* v. *Tennessee,* 148 U. S. 503, that the true boundary line between the two States was the compromise line of 1803, commonly called the diamond line, and believed that that line should be ascertained, re-located and re-marked by suitable and enduring monuments and concurred so far in the prayer of the State of Tennessee that this court should appoint commissioners, residents of neither Tennessee nor Virginia, to perform the work of re-locating, re-tracing and re-marking that compromise line. On the 17th day of the same April the parties entered into the following stipulation:

*502 * "It is agreed by the parties to this cause as a basis for decree:

"1. That the true boundary line between the States of Virginia and Tennessee is the compromise line established by proceedings had by the two States in 1801-1803, which was actually run and located at that time and marked with five chops in the shape of a diamond, and commonly called the diamond line, and running from White Top Mountain to Cumberland Gap.

"2. That said line has in some parts of it, if not along its entire course, become so far obscured and uncertain as to embarrass the administration of the state and Federal laws and produce confusion as to rights of property and conflict and litigation between the citizens of the two States and to necessitate its ascertainment, re-running and re-marking.

"3. That a decree be passed at once by this court providing for the ascertainment, re-tracing and re-marking of said line.

"4. That the names W. C. Hodgkins, A. H. Buchanan and J. B. Baylor are suggested and agreed upon as satisfactory commissioners to be appointed by this court to ascertain, re-trace and re-mark said line.

"5. That the record and opinion of the supreme court of Virginia in the case of *Miller* v. *Wills* shall not be considered as any part of the pleadings in this cause, and need not therefore be printed.

"6. That whatever costs may be required to be borne by the said States shall be equally borne and divided between them.

"April 17, 1900.

"The State of Tennessee,
"By G. W. Pickle, *Att'y Gen'l.*
"The State of Virginia,
"By A. J. Montague,
"Attorney General."

On the same 17th day of April the cause was submitted to the court by the respective counsel.

Mr. G. W. Pickle, Attorney General of the State of Tennessee, for Tennessee.

Mr. A. J. Montague, Attorney General of the State of Virginia, for Virginia.

*503 * MR. CHIEF JUSTICE FULLER announced that the court ordered the following decree to be entered:

This cause coming on to be heard on the original bill filed herein by the State of Tennessee against the State of Virginia, the answer thereto by the State of Virginia, the reply to said answer by the State of Tennessee, and the stipulations filed herein by counsel for the respective parties; and the pleadings and stipulations having been duly considered, and the decree of this court entered on the third day of April, A. D. 1893, at the October term, 1892, in a certain original cause in equity, wherein the State of Virginia was complainant and the State of Tennessee was defendant, and the record of said cause, having been examined:

It is, thereupon, this thirtieth day of April, 1900, ordered, adjudged and decreed that the boundary line established between the States of Virginia and Tennessee by the compact of 1803, between the said States, is the real, certain and true boundary between the said States, which boundary line was actually run and located under proceedings had by the two States in 1801-1803, was then marked with five chops in the shape of a diamond, was commonly known as the diamond line, and ran from White Top Mountain to Cumberland Gap.

And it appearing further to the court that the said boundary line has become so far obscured by lapse of time or loss of monuments as to justify and necessitate its reëstablishment and re-marking under the direction of this court, it is, therefore, further ordered, adjudged and decreed that William C. Hodgkins of the State of Massachusetts; James B. Baylor of the State of Virginia; and Andrew H. Buchanan of the State of Tennessee be and they are hereby appointed commissioners to ascertain, re-trace, re-mark and reëstablish said boundary line, but without authority to run or establish any other or new line.

And it is further ordered that before entering upon the discharge of their duties, each of the said commissioners shall be duly sworn to perform faithfully, impartially, without prejudice or bias, the duties herein imposed, said oath to be taken before the clerk of this court, or before either of the clerks of the

*504 Circuit Court of the United States for the States of Massachusetts, * Virginia or Tennessee, and returned with their report; that said commissioners may arrange for their organization, their meetings, and the particular manner of the performance of their duties; and are authorized to adopt all ordinary and legitimate methods for the ascertainment of the true location of said boundary line, including the taking of evidence; but in the event evidence is taken, the parties shall be notified and permitted to be present and examine and cross-examine the witnesses, and the rules of law as to admissibility and competency shall be observed; and all evidence taken by the commissioners, and all exceptions thereto, and action thereon, shall be preserved and certified, and returned with their report.

And when the true location of said boundary line is ascertained, said commissioners shall cause such marks and monuments of a durable nature to be so

placed on and along said line as to perpetuate it, and enable the citizens of each State, and others, to find it with reasonable diligence.

It is further ordered that the clerk of this court at once forward to the chief magistrate of each of said States, and to each of the commissioners designated by this decree, a copy of the decree duly authenticated, and that the commissioners proceed with all convenient speed to discharge their duty in ascertaining, re-tracing, re-marking and reëstablishing said line, as herein directed, and make their report thereof and of their proceedings in the premises to this court, on or before the first day of the next term thereof, together with a complete bill of costs and charges annexed.

And it is further ordered that, should vacancies occur in said board of commissioners, while the court is not in session, the Chief Justice is hereby authorized and empowered to appoint other commissioners, to supply the same, and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all costs of this proceeding, including remuneration not exceeding ten dollars per day for each commissioner, and the other costs incident to the ascertaining, re-tracing, re-marking and reëstablishing said line, shall be paid by the States of Tennessee and Virginia equally.

Ordered accordingly.[1]

State of Missouri v. State of Illinois and the Sanitary District of Chicago.

Supreme Court of the United States, 1901.

[180 *United States,* 208.]

This suit was brought by the State of Missouri against the State of Illinois and the Sanitary District of Chicago. The latter is alleged to be "a public corporation, organized under the laws of the State of Illinois and located in part in the city of Chicago, and in the county of Cook, in the State of Illinois, and a citizen of the State of Illinois." The remedy sought for is an injunction restraining the defendants from receiving or permitting any sewage to be received or discharged into the artificial channel or drain constructed by the Sanitary District, under authority derived from the State of Illinois, in order to carry off and eventually discharge into the Mississippi the sewage of Chicago, which had been previously discharged into Lake Michigan, and from permitting the same to flow through said channel or drain into the Des Plaines River, and thence by the river Illinois into the Mississippi. The bill alleged that the nature of the injury complained of was such that an adequate remedy could only be found in this court, at the suit of the State of Missouri. The object of the bill was to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants, and the bill charged that the acts of the defendants, if not restrained, would result in the transportation, by artificial means, and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago, and in the bed of the Illinois River, which will poison the water supply of the inhabitants of Missouri, and injuriously affect that por-

[1]For the final phase of this case see *Tennessee* v. *Virginia* (190 U. S. 64), *post* p. 1327. —Editor.

tion of the bed or soil of the Mississippi River which lies within its territory. The bill did not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway, but it sought relief against the pouring of sewage and filth through it by artificial arrangements into the Mississippi River, to the detriment of the State of Missouri and its inhabitants. The defendants demurred to the bill for want of jurisdiction and for reasons set forth in the demurrer. This court *held* that the demurrer could not be sustained, and required the defendants to appear and answer.

In January, 1900, the State of Missouri filed in this court a bill of
*209 complaint against the State of Illinois and the Sanitary * District of Chicago, a corporation of the latter State, in the following terms:

"The complainant, the State of Missouri, and one of the States of the United States, brings this its bill of complaint against the State of Illinois, one of the States of the United States, and the Sanitary District of Chicago, a public corporation, organized under the laws of the State of Illinois, and located in part in the city of Chicago and in the county of Cook, in said State of Illinois, and a citizen of the State of Illinois.

"And your orator complains and says that it is a State containing a population of upwards of three milions of people, and lying on the west bank of the Mississippi River, a public, navigable and running stream, and having a frontage on said stream of over four hundred miles.

"And your orator shows that by the act of Congress providing for the organization and admission of Illinois and Missouri as States of the Union it was declared that the western boundary of Illinois and the eastern boundary of Missouri should be the middle of the main channel of the Mississippi River; that the shores of the Mississippi River, where its waters form the Misouri and Illinois boundary, and the soil under the waters thereof, were not granted by the Constitution of the United States, but were reserved to the States of Illinois and Missouri respectively.

"And your orator shows that the States of Missouri and Illinois each have concurrent general jurisdiction over the waters of the Mississippi River forming the boundary between them, and each of said States has exclusive territorial jurisdiction over that portion adjacent to its own shore, and your orator shows that the Illinois River empties into the Mississippi River at a point above the city of St. Louis, on the Illinois side of said Mississippi River.

"And your orator further shows that within the territory of your orator and on the banks and shores of said Mississippi River and below the mouth of the Illinois River are many cities and towns in the State of Missouri, and many thou-
sands of persons who are compelled to and do rely upon the waters of said
210 river, in their regular, natural and accustomed flow, for their daily necessary supply of water for drinking and all other domestic and agricultural and manufacturing purposes, and for watering stock and animals of all kinds, and that said Mississippi River has been flowing in its regular course and has been used for the purposes aforesaid by the inhabitants of the said State of Missouri for a time whereof the memory of a man runneth not to the contrary, and that said river and its waters and the use thereof for drinking, agricultural and manufacturing purposes, in their accustomed and natural flow, are indispensable to the life and health and business of many thousands of the inhabitants of the State of Missouri and of great value to your orator as a State.

"And your orator shows that cities and towns below the mouth of said Illinois River, within the territory of your orator, do and are compelled, by means of water works, water towers and intakes, built and constructed for that purpose, to supply the inhabitants of said cities and towns with an adequate supply of pure and wholesome water, fit and healthful for drinking and all other domestic purposes and uses, from the said Mississippi River so flowing in its ancient, accustomed and natural course.

"And your orator shows that said water works systems are constructed with reference to said Mississippi River and for the purpose of taking water therefrom and not from any other source.

"And your orator shows that heretofore, to wit, in 1889, the State of Illinois enacted a law known as the Sanitary District act, together with an act for the improvement of the Illinois and Des Plaines Rivers, and that under said act of said State the said corporation known as the said Sanitary District of Chicago was organized and is now existing and operating, and that by the express terms of said act any canal or drain corporation organized in accordance with its provisions may have conditions, restrictions or additional requirements placed on said corporation, or the act authorizing the creation of said corporation may be amended or repealed, and that by the express provisions of said act, before any water or sewage shall be admitted into any channel constructed under said act, the trustees of said channel shall notify the Governor of Illinois
*211 * of the completion of said channel, and the Governor of Illinois shall appoint three commissioners to examine said canal or channel and report to the Governor if the same complies with the act of the State of Illinois; and if it does, the Governor shall authorize the water and sewage to be turned into said channel; and that without said permit it cannot be so turned in; and that by the general provisions of said act said channel is at all times subject to the control and supervision of the State of Illinois and her authorities.

"And your orator further shows that the Chicago River is situated in the basin of Lake Michigan and has two forks or branches flowing through the city of Chicago and into Lake Michigan, and that the natural drainage of Chicago, Illinois, is into Lake Michigan, and the sewage and drainage of the territory embraced in the defendant's district, the Sanitary District of Chicago, is led into or flows into the Chicago River and Lake Michigan.

"And your orator further shows that the defendant herein, the Sanitary District of Chicago, with the authority of the State of Illinois, and acting as a governmental agency of said State, and under the supervision and control and subject to the approval of the State of Illinois, has constructed a channel or open drain from the west fork of the south branch of the Chicago River, in the city of Chicago and county of Cook, in the State of Illinois, to a point near Lockport, in the county of Will, in said State, where said channel or drain connects with and empties into the Des Plaines River, which empties into the Illinois River, and which latter river flows and empties into the Mississippi River at a point distant about forty-three miles above the city of St. Louis, Missouri.

"And your orator further states that the channel built by the Sanitary District of Chicago was so built by said Sanitary District as one of the governmental agencies of the State of Illinois, and by the pretended lawful authority of said

State, and under the direction, supervision and control and governmental power of the State of Illinois, and which said State has heretofore at all times sanctioned and now, through its Governor and other officers, sanctions the building of said channel and opening thereof.

*212 * "And your orator further shows that in the construction of said channel or drain the defendant, the Sanitary District of Chicago, Illinois, with the sanction and approval of the State of Illinois, cut through the natural ridge or watershed which divides the basin of Lake Michigan from the basins of the Des Plaines and Illinois Rivers and the basin of the Mississippi River, and that having so constructed said channel and having about completed the same, and having, under the supervision of and with the sanction of the State of Illinois, extended said artificial channel through said natural divide of the watershed, the defendants now propose and threaten to receive into said channel or drain the sewage matter and filth of the Sanitary District of Chicago, which embraces nearly the whole city of Chicago and a portion of the county of Cook, and, without any legal authority so to do, has already in part effectuated its said threat and purpose and threatens to permit and to cause said sewage and filth, by artificial means of pumping and otherwise, to flow through the channel or drain towards and into the said Des Plaines River and eventually into the Mississippi River, thereby, with the approval of and subject to the inspection and control and supervision of the State of Illinois, and by the pretended authority thereof, reversing the natural flow of said Chicago River.

"And your orator further shows that the sewage matter and poisonous filth which it is thus threatened to receive and to permit and to cause to flow through said artificial channel into said Des Plaines River is that which is created by a population of upwards of one and one half millions of people, besides that which is created by a great number of stock yards, slaughtering establishments, rendering establishments, distilleries and other business enterprises and industries lining both sides of the Chicago River, producing filth and noxious matters; all of which are there discharged into the said Chicago River or drained therein from the surface.

"And your orator further shows that for many years past the said city of Chicago, the greater portion of which is embraced in the limits of the defendant corporation, the Sanitary District of Chicago, as aforesaid, has been dis-

*213 charging its sewage matter * and filth into the Chicago River and into Lake Michigan in such large quantities that much of it has accumulated in the bed and along the sides of the river and upon the bed of said Lake Michigan, near the shores thereof, and that the plan threatened and attempted now to be adopted by the defendant, the Sanitary District of Chicago, acting in conjunction with and subject to the control of the defendant, the State of Illinois, and by the pretended authority of the said State of Illinois, will loosen said accumulated matter and filth, and will also direct it and cause it to flow towards and into said artificial channel or drain, and thence into said Des Plaines River, and finally into the Mississippi River and into the waters thereof within the jurisdiction and under the control of your orator and past the homes of the inhabitants of your orator and the towns and cities within the borders of your orator, and past the water works of said cities and towns within the State of Missouri.

"And your orator further shows that the amount of said undefecated filth

and sewage and poisonous and unhealthful and noxious matters proposed to be, and now about to be, permitted to be turned into said artificial channel and through said Des Plaines and Illinois Rivers into the Mississippi River from the said Sanitary District of Chicago by the defendants, acting jointly, will amount daily to about fifteen hundred tons, and that if defendants should be permitted to carry their said threats into execution, and should cause said above amount of undefecated sewage and other poisonous and noxious matters, which would otherwise flow into Lake Michigan, to flow into the Mississippi River, that the waters of the Mississippi River within the jurisdiction of your orator will of a certainty be poisoned and polluted and rendered wholly unfit and unhealthful for drinking and domestic uses, and will render wholly valueless and entirely worthless the various water works systems of towns and cities on the borders of the State of Missouri, established and acquired at great cost and expense, and will deprive your orator, the State of Missouri, and its inhabitants, of the right to use of the waters of said river for drinking and all other domestic and manufacturing and agricultural purposes, as said
*214 water has been so used and in accustomed and natural flow heretofore * for the length of time that the memory of man runneth not to the contrary thereof.

"And that said threatened action of the defendants will amount to a direct and continuing nuisance and be an interference with the use by your orator and its inhabitants of the waters of the Mississippi River flowing in their natural state, polluting and poisoning the same by the means aforesaid, whereby the health and lives of the inhabitants of your orator will be endangered and the business interests of said State will be greatly and irreparably injured, and which said damage to the lives and health and the business interests of said State resulting from said poisoning and polluting of said waters as aforesaid to your orator cannot be estimated in money value.

"And your orator on information and belief states and charges the fact to be that said fifteen hundred tons of poisonous undefecated filth and sewage of said Sanitary District of Chicago will be daily carried through said artificial channel and sent through the Des Plaines and Illinois Rivers into the Mississippi, and great quantities thereof will be deposited in the bed and soil of said river belonging to your orator and wholly within the jurisdiction thereof, to your orator's great and irreparable damage, and that the fifteen hundred tons of undefecated sewage and filth now about to be daily injected into the waters of the Mississippi River and into the portion thereof over which the State of Missouri has jurisdiction, and from which thousands of her inhabitants obtain drinking water, will pollute and poison the said water of the Mississippi to such an extent as to render it unwholesome and unfit and unhealthful for use by drinking by the said inhabitants in the territory of your orator and unfit for use for watering stock and for manufacturing purposes.

"And your orator further shows that great quantities of undefecated sewage turned into the Mississippi River in the manner and by the means aforesaid will poison and pollute said water with the germs of disease of various and many kinds. And your orator further shows that the acts herein complained of on the part of the State of Illinois, acting in conjunction with one of her
*215 governmental agencies, the said Sanitary District of * Chicago, will cause a continuing nuisance in the Mississippi River, and that the said State of

Illinois has no power or authority to cause or permit or assist in causing the commission and continuance of a nuisance in the flowing waters of the Mississippi River, a navigable stream, to the detriment and irreparable and continuing damage and injury of the State of Missouri, and the continuing and irreparable injury to the lives and health of the citizens and inhabitants of the State of Missouri, and that unless restrained by the order and decree of this court the defendants, the State of Illinois and the Sanitary District of Chicago, acting together, will, in accordance with the terms of the act under which said Sanitary District is organized, upon the permit and authority of the Governor of Illinois, and of the State of Illinois turn said water and sewage aforesaid, by the manner and means aforesaid, into the Des Plaines and Illinois Rivers and thence into the Mississippi, all of which your orator says and avers is contrary to equity and good conscience, and would result in the manifest and irreparable injury of your orator and the health of her citizens in the premises, and your orator is wholly without remedy at law and without any adequate remedy to prevent the flowing of said sewage, as aforesaid, save by the interposition of this court.

"For as much as your orator can have no adequate relief except in this court, and to the end, therefore that the defendants may, if they can, show why your orator should not have the relief prayed, and to the end that the defendants may make a full, true, direct and perfect answer to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and to the end that the defendants, their officers, agents, servants and employés may be restrained by injunction issuing out of this court from receiving or permitting any sewage to be received or discharged into said artificial channel or drain, and from permitting the same to flow or causing the same to be made to flow through said channel or drain towards and into the Des Plaines River, your orator prays that your honors may grant a writ of injunction, under the seal of this honorable court, properly restraining and
*216 enjoining the defendants, the officers, agents, employés and * servants of the Sanitary District of Chicago and the State of Illinois, from permitting or causing any of said sewage to be discharged into said channel or drain, and from permitting or causing said sewage and poisonous filth thence to flow into said Des Plaines River; that defendant, the State of Illinois, be enjoined and restrained from issuing to its codefendant permission and authority to do and perform the acts aforesaid or to allow them to be done; and your orator also prays for a provisional or temporary injunction pending this cause, restraining and enjoining the several acts aforesaid, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

"May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the State of Illinois, the Governor and Attorney General thereof, and to said Sanitary District of Chicago, its officers, trustees and agents, commanding them on a day certain to appear and answer unto this bill or complaint, and to abide such order and decree of the court in the premises as to the court shall seem proper and required by the principles of equity and good conscience."

In March, 1900, came the defendants and filed a demurrer to the bill of complaint, in the following terms:

"Now comes the State of Illinois by its Attorney General, Edwin C. Akin, and the Sanitary District of Chicago, by its attorneys, and demur to the bill of complaint filed herein, and say that the said bill of complaint and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said State of Missouri to have and maintain its aforesaid action against the said State of Illinois and the Sanitary District of Chicago, and that said defendants are not bound by the law of the land to answer the same; and the said defendants, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said bill of complaint:

*217 * "*First.* That this court has no jurisdiction of either the * parties to, or of the subject-matter, of this suit, because it appears upon the fact of said bill of complaint that the matters complained of, as set forth therein, do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Missouri and the State of Illinois, or any of its citizens.

"*Second.* That the matters alleged and set forth in said bill of complaint show that the only issues presented therein arise, if at all, between the State of Illinois and a public corporation created under the laws of said State, and certain cities and towns, in their corporate capacity as such, in the State of Missouri, and certain persons in said State of Missouri, residing on or near the banks of the Mississippi River, and which matters so stated in said bill of complaint, if true, do not concern the State of Missouri as a corporate body or State.

"*Third.* That said bill of complaint shows upon its face that this suit is in fact for and on behalf of certain cities and towns in said State of Missouri, situated on the banks of the Mississippi River, and certain persons who reside in said State on or near the banks of said river; and that, although the said suit is attempted to be prosecuted for and in the name of the State of Missouri, said State is, in effect, loaning its name to said cities and towns and to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said cities and towns in their corporate capacity as such, and said private persons or citizens of said State.

"*Fourth.* That it appears upon the face of said bill of complaint that the said State of Missouri, in her right of sovereignty, in seeking to maintain this suit for the redress of the supposed wrongs of certain cities and towns in said State, in their corporate capacity as such, and of certain private citizens of said State, while under the Constitution of the United States and the laws enacted thereunder, the said State possesses no such sovereignty as empowers it to bring an original suit in this court for such purpose.

"*Fifth.* That it appears upon the face of said bill of complaint that no property rights of the State of Missouri are in any manner affected by the

*218 matters alleged in said bill of complaint; * nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

"*Sixth.* That in order to authorize this court to maintain original jurisdiction of this suit as against the State of Illinois, or against any citizen of said State, it must appear that the controversy set forth in the bill of complaint

and to be determined by this court, is a controversy arising directly between the State of Missouri and State of Illinois, or some of its citizens, and not a controversy in vindication of the alleged grievances of certain cities and towns in said State or of particular individuals residing therein.

"*Seventh.* That said bill of complaint is in other respects uncertain, informal and insufficient, and that it does not state facts sufficient to entitle the said State of Missouri to the equitable relief prayed for in said bill of complaint.

"Wherefore, for want of a sufficient bill of complaint in this behalf, the said defendants pray judgment; and that the said State of Missouri may be barred from having or maintaining the aforesaid action against said defendants, and that this court will not take further cognizance of this cause, and that the said defendants be hence dismissed with their costs."

On November 12, 1900, the case came on to be heard on bill and demurrer, and was argued by counsel.

Mr. William M. Springer and *Mr. Charles C. Gilbert* for the demurrer. *Mr. Edward C. Akin* and *Mr. Samuel M. Burdett* were on their brief.

Mr. B. Schnumacher in opposition to the demurrer. *Mr. Edward C. Crow* was on his brief.

Mr. Justice Shiras, after making the foregoing statement, delivered the opinion of the court.

This cause is now before us on the bill of complaint and the demurrer thereto.

The questions thus presented are two: First, whether the allegations of
*219 the bill disclose the case of a controversy between * the State of Missouri and the State of Illinois and a citizen thereof, within the meaning of the Constitution and statutes of the United States, which create and define the original jurisdiction of this court; and, second, whether, if it be held that the allegations of the bill do present such a controversy, they are sufficient to entitle the State of Missouri to the equitable relief prayed for.

The question whether the acts of one State in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent State, would create a sufficient basis for a controversy, in the sense of the Constitution, would be readily answered in the affirmative if regard were to be had only to the language of that instrument.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, . . . to controversies between two or more States, between a State and citizens of another State. . . . In all cases, . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction." Constitution, Article 3.

As there is no definition or description contained in the Constitution of the kind and nature of the controversies that should or might arise under these

provisions, it might be supposed that, in all cases wherein one State should institute legal proceedings against another, the original jurisdiction of this court would attach.

But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration.

After the declaration of independence the united colonies, through
*220 delegates appointed by each of the colonies, considered * Articles of Confederation, which were debated from day to day, and from time to time, for two years, and were on July 9, 1778, ratified by ten States; by New Jersey, on November 26 of the same year; by Delaware, on the 23d of February, 1779, and by Maryland on March 1, 1781.

The first Article was as follows: "The style of this Confederacy shall be, 'The United States of America.'"

The ninth Article contained, among other provisions, the following:

"The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more States, concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislature or executive authority, or lawful agent, of any State, in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties, by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress
*221 shall strike in behalf * of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive—the judgment or sentence, and other proceedings, being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided, that every commis-

sioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward: provided, also, that no State shall be deprived of its territory for the benefit of the United States."

It will therefore be perceived that under the confederation the necessity of a tribunal to hear and determine matters in question between two or more States was recognized; that a court was provided for that purpose; and that the scope or field within which it was expected such matters in question or controversies should or might arise for the determination of such court, extended to *"all disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction or any other cause whatever."*

When the Federal convention met in 1787 to form the present Constitution of the United States several drafts of such an instrument were presented for the consideration of the convention. One of these was offered on May 29 by Edmund Randolph, of Virginia, in the shape of resolutions covering the entire subject of a national government. The ninth resolution prescribed the formation of a national judiciary, to consist of a supreme and inferior tribunals, with jurisdiction to hear and determine, among other things, "questions which involve the internal peace or harmony." Elliot's Deb. vol. 1, p. 143. On the same day Charles Pinckney, of South Carolina, submitted a draft of a Federal Government, the seventh article whereof was as follows:

*222 * "The Senate shall have the sole and exclusive power to declare war and to make treaties, and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court."

"They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now subsisting, or which may arise, between the States respecting jurisdiction or territory." Elliot's Deb. vol. 1, p. 145.

On June 19 the committee of the whole, to which had been referred the several propositions and drafts, reported to the convention for its consideration a draft as altered, amended and agreed to in the committee. The thirteenth resolution was as follows:

"That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony." Elliot's Deb. vol. 1, p. 182.

On August 6, a committee of five members, to which the various propositions, as originally made and as amended in the committee of the whole, reported to the convention a draft of the Constitution, the ninth article of which was as follows:

"SEC. 1. The Senate of the United States shall have power to make treaties and appoint ambassadors and judges of the Supreme Court.

"SEC. 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers, etc. [And here follows a scheme for a special court, in terms similar to that provided in the articles of confederation.]

"SEC. 3. All controversies concerning lands claimed under different grants of two or more States, whose jurisdiction, as they respect such lands, shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before subscribed for deciding controversies between different States."

The eleventh article contained, among other sections, the following:

*223 * "SEC. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States. . . .

"SEC. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States; and between a State or the citizens thereof and foreign states, citizens or subjects." Eliot Deb. vol. 1, p. 224.

It may be observed, in passing, that, in this draft, all disputes and controversies between two or more States, respecting jurisdiction or territory, are to be determined by a special court to be constituted by the Senate; and controversies between two or more States, except such as shall regard territory or jurisdiction, are determinable by the Supreme Court. It is, therefore, apparent that other disputes or controversies between States were regarded and provided for besides those respecting territory or jurisdiction.

This draft, together with numerous suggestions and amendments, was on August 7 submitted to the committee of the whole.

On September 12 a committee on revision reported a draft of the Constitution as revised and arranged. This draft, which, as respects our present subject, was in the terms of the Constitution as finally adopted, took from the Senate the power to constitute a court to try disputes between the States respecting territory or jurisdiction and struck out the provision excluding from the jurisdiction of the Supreme Court disputes between the States in matters respecting jurisdiction and territory. The entire jurisdiction of controversies between States was bestowed upon the Supreme Court, in the second section of article three, in the following terms:

*224 "The judicial power shall extend to all cases in law and * equity, arising under this Constitution, the laws of the United States and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States, and between a State or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have

appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

As in this section power is conferred on Congress to make regulations affecting the exercise by the Supreme Court of its jurisdiction, it may not be out of place to quote the provisions in this respect of the judiciary act of 1789:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Revised Stat. sec, 687.

The case of *New York* v. *Connecticut,* 4 Dall. 1, in 1799, was the first instance of an exercise by the Supreme Court of its jurisdiction in a controversy between two States. It was a case of a bill in equity filed by the State of New York against the State of Connecticut and certain private persons who were grantees of the latter State of lands, the jurisdiction over which was claimed by both States. The object of the bill was to obtain an injunction to stay proceedings in ejectment pending in the Circuit Court of the United States for the District of Connecticut.

The Court was of opinion that, as the State of New York was not a
*225 party to the suits below, nor interested in the decisions * of those suits, an injunction ought not to issue. 'No argument was made that the court had not jurisdiction, and the court proceeded on the assumption that it possessed jurisdiction, although, under the facts of the case, it refused the injunction prayed for.

New Jersey v. *New York,* 5 Pet. 284, was the case of a bill filed by the State of New Jersey against the State of New York for the purpose of ascertaining and settling the boundary between the two States. In an opinion awarding the process of subpœna Chief Justice Marshall said:

"The Constitution of the United States declares that 'the judicial power shall extend to controversies between two or more States.' It also declares that 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.' . . . It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress."

In March, 1832, the State of Rhode Island filed in this court a bill against the State of Massachusetts, for the settlement of the boundary between the two States, and moved for a subpœna to be issued, according to the practice of the court in similar cases. An appearance was entered for Massachusetts, and a motion was made to dismiss the bill for want of jurisdiction. In support of the motion it was contended that this court had no jurisdiction because of the character of the respondent independent of the nature of the suit, and because of the nature of the suit independent of the character of the respondent. It was not denied that Massachusetts had agreed, by adopting the Federal Constitution, to submit her controversies with other States to judicial decision, but it was claimed that Congress had passed no law establishing a mode of proceeding, the character of the judgment to be rendered, and means of enforcing it. As respects the nature of the suit, it was argued that it was in its character political, brought by a sovereign, in that avowed character; that the judicial power of the United States extended, by the Constitution, only to cases of law

*226 and equity, * and that questions of jurisdiction over territory were not cases of that kind, nor of "a civil nature."

The court held that jurisdiction was conferred by the Constitution and the Judiciary Act, and that, as Massachusetts had appeared, submitted to the process, and pleaded in bar of the plaintiff's action certain matters on which the judgment of the court was asked, all doubts as to jurisdiction over the parties were at rest.

As respected the power of the court to hear and determine the subject-matters of the suit, it was held that jurisdiction existed; that the dispute was a controversy between two States within the judicial power of the United States. 12 Pet. 657; 13 Pet. 23.

Before leaving this case it is to be remarked that the principal contest was as to whether a question of boundary, involving as it did the question of sovereignty over territory, was a judicial question of a civil nature. The implication was that the controversies between two or more States, in which jurisdiction had been granted by the Constitution, did not include questions of a political character. In some of the later cases the contention has been the very opposite; that the intention of the Constitution was only to apply to questions in which the sovereign and political powers of the respective States were in controversy.

In *Florida* v. *Georgia,* 11 How. 293, leave was given by this court to the State of Florida to file a bill against the State of Georgia, and process of subpœna was directed to be issued against the State of Georgia. The object of the bill was to ascertain and establish the boundary between the two States, which was in controversy. The State of Georgia answered, and the cause was proceeded in in pursuance of the prayers of the bill. Subsequently an application was made by the Attorney General of the United States, alleging that the latter were interested and concerned in the matter in controversy, and moving the court that he be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court should order. This motion was *227 opposed by the States, and the matter was argued at length. The * judges differed, but neither in the opinion of the majority, granting the motion of the Attorney General, nor in that of the dissenting minority, was any doubt expressed of the existence of the jurisdiction of the court over the controversy between the two States.

Pennsylvania v. *Wheeling & Belmont Bridge Company,* 9 How. 647; *Same* v. *Same,* 11 How. 528; *Same* v. *Same,* 13 How. 518; *Same* v. *Same,* 18 How. 421, 429, was a case in equity, in which the State of Pennsylvania filed a bill against the Wheeling & Belmont Bridge Company, a corporation of Virginia, and certain contractors, charging that the defendants, under color of an act of the legislature of Virginia, were engaged in the construction of a bridge across the Ohio River at Wheeling, which would, as was alleged, obstruct its navigation to and from the ports of Pennsylvania, by steamboats and other crafts which navigated the same. Many different questions were discussed by counsel and considered by the court, respecting the nature and extent of the jurisdiction of this court, the right of the complainant State, whether at law or in equity, and the character of the decree which could be rendered. Several observations made in the opinion of the court will be hereafter adverted to when we come

to consider the second ground of demurrer urged in the case before us. It is sufficient for our present purpose to say that the original jurisdiction of the court was sustained, a commissioner was appointed to take and report proofs, and a decree was entered declaring the bridge to be an obstruction of the free navigation of the river; that thereby a special damage was occasioned to the plaintiff, for which there was not an adequate remedy at law, and directing that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

South Carolina v. *Georgia,* 93 U. S. 4, was a suit in equity brought in this court, whereby the State of South Carolina sought an injunction to restrain the State of Georgia, the United States Secretary of War, the Chief Engineer of the United States army, their agents and subordinates, from obstructing the navigation of the Savannah River, in violation of an alleged compact subsisting
*228 between the States of South Carolina and * Georgia, and which had been entered into on April 24, 1787. This court, not denying but assuming jurisdiction in the case, held that, by adopting the Federal Constitution, and thereby delegating to the General Government the right to regulate commerce with foreign nations and among the several States, the compact between the two States, in respect to the Savannah River, ceased to operate, and that the acts complained of, being done in pursuance of congressional authority, and designed to improve navigation, could not be deemed an illegal obstruction, and accordingly the special injunction previously granted was dissolved and the bill dismissed.

Wisconsin v. *Duluth,* 96 U. S. 379, was the case of a bill in chancery filed in this court by the State of Wisconsin, by virtue of the constitutional provision which confers original jurisdiction of suits between the States and between a State and citizens of other States. The city of Duluth, a corporation and citizen of the State of Minnesota, was defendant; and, after answer, replication and the taking of a large amount of evidence, the case came on for a final decree. The nature of the case and the reasoning upon which this court proceeded in disposing of it will sufficiently appear in the following quotations from the opinion delivered by Mr. Justice Miller:

"The present suit was brought by the State of Wisconsin on the ground that the channel of the St. Louis River, as it flowed in a state of nature, was the common boundary between that State and the State of Minnesota, and that she had an interest in the continuance of the channel as an important highway for navigation and commerce in its natural and usual course; that the canal cut by Duluth across Minnesota Point, deeper than the natural outlet of the St. Louis River at its mouth, has diverted, and will continue to divert, the current of that river through Superior Bay into the lake by way of that canal. That the result of this is, that while the current cuts that canal deeper and gives an outlet for the water there at a lower level, it at the same time, by diverting this current from the old outlet, causes it to fill up, and thus destroy the usefulness of the river and bay as an aid of commerce, on which the State had a right to rely. The
*229 bill, after reciting the facts which we have already detailed, * insists that the city of Duluth cannot, by any right of her own, nor by any authority conferred on her by the State of Minnesota, thus divert the waters of the stream —the St. Louis River—from their natural course, to the prejudice of the rights of the State of Wisconsin or of her citizens. It declares that this canal at Duluth

does this in violation of law; and it prays this court to enjoin Duluth from protecting or maintaining it, and by way of mandatory injunction to compel that city to fill up the canal and restore things in that regard to the condition of nature in which they were before the canal was made.

"The answer, while admitting the construction of the canal, denies almost every other material allegation of the bill. It denies especially that the canal has the effect of changing the course of the current of the river, or does any injury to the southern entrance to Superior Bay or diminishes the flow of water at that point. A large amount of testimony, professional and non-professional, is presented on that subject.

"The answer also sets up, as an affirmative defence to the relief sought by the bill, that the United States, by the legislative and executive departments of the Government, have approved of the construction of the canal, have taken possession and control of the work, have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at the western end of the great system of lake navigation.

"Many very interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defence deny that the State of Wisconsin has any such legal interest in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take cognizance of no question which concerns alone the rights of a State in her political or sovereign character. That to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a State, in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point
*230 applicable to the case before us. * Nor shall we address ourselves to the consideration of the mass of conflicting evidence as to the effect of the canal on the flow of the waters of Superior Bay.

"We will first consider the affirmative defence already mentioned; for, if that be found to be true in point of fact, it will preclude any such action by this court as the plaintiff has prayed for."

The court then proceeded to inquire into the action of the General Government in the matter of the canal in question, and found that, as a matter of fact, the United States had taken possession and control of the canal as a public work. The opinion concluded as follows:

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this court decree that it must forever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"When Congress appropriates $10,000 to improve, protect and secure this canal, this court can have no power to require it to be filled up and obstructed. While the engineering officers of the Government are, under the authority of Congress, doing all they can to make this canal useful to commerce and to keep

it in good condition, this court can owe no duty to a State which requires it to order the city of Duluth to destroy it.

"These views show conclusively that the State of Wisconsin is not entitled to the relief asked by the bill, and that it must, therefore, be dismissed with costs."

The court, therefore, did not decline jurisdiction, but exercised it, by inquiring into the facts put in issue by the bill and answer, and by dismissing the bill for want of equity.

In *Virginia* v. *West Virginia,* 11 Wall. 39, a bill was filed in this court
*231 to settle the boundaries between the two States. * There was a demurrer to the bill. In delivering the opinion of the court Mr. Justice Miller said:

"The first proposition on which counsel insist, in support of the demurrer is, that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two countries which are the subject of dispute. This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well-considered cases have been decided."

And, after citing *Rhode Island* v. *Massachusetts,* 12 Pet. 651; *Missouri* v. *Iowa,* 7 How. 660; *Florida* v. *Georgia,* 17 How. 478, and *Alabama* v. *Georgia,* 23 How. 505, the conclusion of the court was thus expressed:

"We consider, therefore, the established doctrine of this court to be that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts and agreements between those States, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding."

In *New Hampshire* v. *Louisiana and Others,* and *New York* v. *Louisiana and Others,* 108 U. S. 76, it was found that, in view of the Eleventh Amendment to the Constitution of the United States, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State," as matter of fact, under the pleadings and testimony, the suits were commenced and were prosecuted solely by the owners of the bonds and coupons, to collect which was the object of the suits, and it was accordingly held "that the evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States or aliens, without the consent of the
*232 * State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts, owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

In *Wisconsin* v. *Pelican Insurance Company,* 127 U. S. 265, 286, the nature

of the case and of the question involved was thus stated by Mr. Justice Gray, in delivering the opinion of the court:

"This action is brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the State, as required by that statute. The leading question argued at the bar is whether such an action is within the original jurisdiction of this court.

"The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the States of the Union, and the defendant a corporation of another of the States."

After citing and considering the cases, the justice expressed the following conclusions:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. . . . From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a State and citizens of another State, or of a foreign country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. . . . The statute of Wisconsin, under which the State recovered
*233 in one of her own courts the * judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. . . . This court, therefore, cannot entertain an original action to compel the defendants to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine."

And consequently judgment was entered for the defendant on the demurrer that had been interposed to the declaration.

Hans v. *Louisiana,* 134 U. S. 1, was an action brought in the Circuit Court of the United States for the Eastern District of Louisiana, against the State of Louisiana, by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State. The Circuit Court, on motion of the attorney general of the State, dismissed the case for want of jurisdiction. This court affirmed the judgment of the Circuit Court, and held that the judicial power of the United States did not extend to the case of a suit brought against a State by one of its own citizens.

In the course of the opinion, delivered by Mr. Justice Bradley, the following observations were made:

"The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such,

for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore,* 1 Vesey, Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose by those articles.

131 U. S. App. 1. The establishment of this new branch of jurisdiction
*234 seemed to be * necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 288, 289, and cases there cited."

The last case which we have had occasion to examine is that of *Louisiana* v. *Texas,* 176 U. S. 1, 16. The case was brought before us by a bill in equity, filed by the State of Louisiana against the State of Texas, her Governor and her health officer. The bill alleged that the State of Texas had granted to its Governor and its health officer extensive powers over the establishment and maintenance of quarantines over infectious and contagious diseases; that this power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas, which were business rivals of the city of New Orleans, and prayed for a decree that neither the State of Texas, nor her Governor, nor her health officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce an embargo against interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, or the right to make discriminative rules affecting the State of Louisiana, or any part thereof, and different from and more burdensome than the quarantine rules and regulations applied to other States and countries; and the bill asked for an injunction restraining the Texas officials from enforcing the Texas laws in the manner in which they were enforced. To this bill a demurrer was filed, assigning the following causes:

"First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of the bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the States of Louisiana and Texas. Second. Because the allegations of the bill show that the only issues presented by said bill arise between the State of Texas or her officers, and certain persons in the city of New Orleans, in the State of Louisiana, who were engaged in
*235 interstate * commerce, and which do not in any manner concern the State of Louisiana as a corporate body or State. Third. Because such bill shows upon its face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the State of Louisiana, said State is in effect loaning its name to said individuals and is only a nominal party—the real parties at interest being said individuals in the city of New Orleans who are engaged in interstate commerce. Fourth. Because it appears from the face of said bill that the State of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the constitution and laws the said State

possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose. Fifth. Because it appears from the face of the bill that no property rights of the State of Louisiana are in any manner affected by the quarantine complained of, nor, is any such property right involved in this suit as would give this court original jurisdiction of this cause."

In the opinion of the court, delivered by Mr. Chief Justice Fuller, after a consideration of the cases hereinbefore mentioned and of others, it was said:

"In order then to maintain jurisdiction of this bill of complaint, as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals.

"By the Constitution the States are forbidden to enter into any treaty, alliance or confederation; grant letters of marque and reprisal, or, without the consent of Congress, 'keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.'

"Controversies between them arising out of public relations and inter-
*236 course cannot be settled either by war or diplomacy, * though, with the consent of Congress, they may be composed by agreement. . . .

"In the absence of agreement it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this court would be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a State in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives. . . .

"But in *Debs, Petitioner,* 158 U. S. 564, involving a case in the Circuit Court, in which the United States had sought relief by injunction, it was observed: 'That while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes its duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties.'

"It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriæ,* trustee, guardian or representative of all her citizens. She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary

and unreasonable quarantine regulations. Inasmuch as the vindication of
*237 the freedom of interstate * commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to relief in this way because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained."

After quoting the provisions of the statute of the State of Texas regulating the subject of quarantine, the Chief Justice proceeded to say:

"It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government. . . . The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the Governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

*238 * "But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. Where there is no agreement, where breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

"In our judgment, this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution.

"Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy 'between a State and citizens of another State.' Jurisdiction over controversies of that sort does not embrace the determination of

political questions, and, where no controversy exists between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States, and such a controversy, as we have said, is not presented."

Accordingly the demurrer was sustained and bill dismissed.

From the language of the Constitution, and from the cases in which that language has been considered, what principles may be derived as to the nature and extent of the original jurisdiction of this court in controversies between two or more States?

*239 * From the language, alone considered, it might be concluded that whenever, and in all cases where one State may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant State, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining State, or to affect the rights of its citizens, the jurisdiction of this court would attach.

Chief Justice Marshall in the case of *Cohens* v. *Virginia,* 6 Wheat, 264, 392, said:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the Constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions, as far as possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases

*240 * arising under the Constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those

cases in which jurisdiction is given, because a State is a party; and to include in the second those in which jurisdiction is given, because the case arises under the Constitution or a law."

But it must be conceded that upon further consideration, in cases arising under different states of facts, the general language used in *Cohens* v. *Virginia,* has been, to some extent, modified. Thus, in the cases of *New Hampshire* v. *Louisiana,* and *New York* v. *Louisiana, ut supra,* jurisdiction was denied to this court where the cause of action belonged to private persons, who were endeavoring to use the name of one State to enforce their rights of action against another. Though, perhaps, it may be said that jurisdiction was really entertained, and that the bills were dismissed, because the court found that, under the pleadings and testimony, the States complainant had no interest of any kind in the proceedings.

So, too, in *Wisconsin* v. *Pelican Insurance Company, ut supra,* the court held that, notwithstanding the action was brought by a State against the citizens of another State and was thus within the letter of the Constitution, yet that the court had a right to inquire into the nature of the case, and, when it found that the object of the suit was to enforce the penal laws of one State against a citizen of another, to refuse to exercise jurisdiction.

In the case of *Louisiana* v. *Texas, ut supra,* the bill was dismissed because a controversy between the two States was not actually presented; that what was complained of was not any action of the State of Texas, but the alleged unauthorized conduct of its health officer, acting with a malevolent purpose against the city of New Orleans. Here again it may be observed that the court did not decline jurisdiction, but exercised it in holding that the facts alleged in the bill did not justify the court in granting the relief prayed for.

The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and
*241 in cases directly affecting the property * rights and interests of a State.

But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.

An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.

The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated

on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.

It is further contended, in support of the demurrer, that even if the State of Missouri be the proper party to file such a bill, yet that the proper defendant is the Sanitary District of Chicago solely, and that the State of Illinois should not have been made a party, and that, as to her, the demurrer ought to be sustained.

*242 * It can scarcely be supposed, in view of the express provisions of the Constitution and of the cited cases, that it is claimed that the State of Illinois is exempt from suit because she is a sovereign State which has not consented to be sued. The contention rather seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporation of the State of Illinois, it therefore follows that the State, as such, is not interested in the question, and is improperly made a party.

We are unable to see the force of this suggestion. The bill does not allege that the Sanitary District is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation is an agency of the State to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended. It is state action and its results that are complained of—this distinguishing this case from that of *Louisiana* v. *Texas,* where the acts sought to be restrained were alleged to be those of officers or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.

The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant.

It is further contended that, even if this court has original jurisdiction of the subject-matter, and even if the respective States have been properly made parties, yet the case made out by the bill does not entitle the State of Missouri to the equitable relief prayed for.

This proposition is sought to be maintained by several considerations. In the first place, it is urged that the drawing, by artificial means, of the sewage of

*243 the city of Chicago into the * Mississippi River may or may not become a nuisance to the inhabitants, cities and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be in-

flicted. Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?

The bill charges that the acts of the defendants, if not restrained, will result in the transportation, by artificial means and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago and in the bed of the Illinois River, which will poison the water supply of the inhabitants of Missouri and injuriously affect that portion of the bed or soil of the Mississippi River which lies within its territory.

In such a state of facts, admitted by the demurrer to be true, we do not feel it necessary to enter at large into a discussion of this part of the defendants' contention, but think it sufficient to cite one or two authorities.

Attorney General v. *Jamaica Pond Aqueduct Corporation,* 133 Mass. 361, was a proceeding in equity in the Supreme Judicial Court to enjoin the defendants from lowering the water in one of the public ponds of Massachusetts. It was claimed that the necessary effect of such lowering would be to impair the rights of the people in the use of the pond for fishing, boating and other lawful purposes, and to create and expose upon the shores of the pond a large quantity of slime, mud and offensive vegetation, detrimental to the public health. The defendants demurred, claiming that no case was stated which came within the equity jurisdiction of the court, and questioning the power of the attorney general, on behalf of the Commonwealth, to maintain the proceedings. Speaking for the court, the Chief Justice said:

"The cases are numerous in which it has been held that the attorney general may maintain an information in equity to restrain a corporation exercising the right of eminent domain under a power delegated to it by the legislature,
*244 from any abuse * or perversion of the powers which may create a public nuisance or injuriously affect or endanger the public interests,"—citing many cases, and proceeding:

"The information in this case alleges not only that the defendant is doing acts which are *ultra vires* and an abuse of the power granted to it by the legislature, but also that the necessary effect of said acts will be to create a public nuisance. This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. And when the nuisance is a public one an information by the attorney general is the appropriate remedy. This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a public nuisance by partially draining the pond and exposing its shores, thus endangering the public health."

And replying to the claim that resort to equity was unnecessary, the court further said:

"The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment or by proceedings under the statutes for the abatement of a nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they now are. In other words, they could not remedy the whole mischief. The preventive force of a decree in

equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy."

The nature of equitable remedy in the case of public nuisances was well described by Mr. Justice Harlan, speaking for the court in the case of *Mugler* v. *Kansas,* 123 U. S. 623, 673:

"The grounds of this jurisdiction, in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public
*245 against them in the future; whereas courts of law * can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community."

In *Coosaw Mining Co.* v. *South Carolina,* 144 U. S. 550, it was said by this court, through Mr. Justice Harlan, after citing English and American cases:

"Proceedings at law or by indictment can only reach past or present wrongs done by appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphate deposits in the bed of Coosaw River."

It is finally contended that, if the bill was not prematurely filed, then it was filed too late; that, by standing by for so long a period, the complainant was guilty of such laches that a court of equity will not grant relief.

The inconsistency between these contentions is manifest, and on consideration, we are of opinion that the suggestion that the complainant's remedy has been lost by delay, is not founded in fact or reason.

In *Goldsmid* v. *Tunbridge Wells Commissioners,* L. R. 1 Eq. 161, answering a similar contention, it was said by Romily, M. R.:

"If the plaintiff comes to the court and complains very early, then the evidence is that the pollution is not preceptible, it is wholly inappreciable, and you get evidence after evidence for the defendants, (the pollution being slight and perhaps only observable at some times and on some occasions,) saying you have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance. Then he waits for five or six years, until it is obvious to everybody's sense that the pollution is considerable, and then they say 'you have come too late, you have allowed this to continue on for twenty years, and we have acquired an easement over your property, and the right of pouring the sewage into it.' My opinion is that any person who has a water course
*246 flowing through his * land, and sewage which is preceptible is brought into that water course, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him. . . .

"This is a matter of very great importance, and it has been suggested to me in argument as a matter that ought to be regarded that private interests must give way to public interests; that the court ought to regard what the advantage

to the public is, and that some little sacrifice ought to be made by private individuals. I do not assent to that view of the law on the subject, and I apprehend that the observations which were quoted to me of Vice Chancellor Sir William Page Wood, in the *Attorney General* v. *The Mayor of Kingston,* 13 W. R. 888, are perfectly accurate, and that private rights are not to be interfered with. But my firm conviction is that in this, as in all the great dispensations and operations of nature, the interests of the individuals are not only compatible with but identical with the interests of the public; and although in this case I have only to consider an injury to the private individual, the plaintiff in the present action, yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the people and the court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle and contagious diseases affecting human beings, such as cholera or typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a con-
*247 siderable distance. I am of opinion * that Mr. Goldsmid was not bound to remain quiet until this stream had become such a nuisance that it was obvious to everybody near its banks; and the result is that in my opinion he is entitled to a decree for an injunction to restrain the defendants from causing or permitting the sewage and other offensive matters from the town of Tunbridge Wells to be discharged into the Calverly Brook, or stream, in such a manner as to affect the waters of the brook as it flows through the plaintiff's land."

This decree of the Master of the Rolls was subsequently affirmed on appeal. L. R. 1 Ch. App. 349.

Similar views prevail in *Chapman* v. *Rochester,* 110 N. Y. 273, where a bill was filed to enjoin the defendant city from polluting, by the discharge of sewage by artificial means, a natural stream flowing through his lands.

In the opinion of the New York Court of Appeals, it was said by Danforth, J., after citing *Goldsmid* v. *Tunbridge Wells:*

"In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant against the judgment appealed from are quite unimportant. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements, prepared by the city, and for which it is responsible. Nor is the plaintiff estopped by acquiescence in the proceedings of the city in devising and carrying out its sewerage system. The principle invoked by the appellant has no application. It does not appear that the plaintiff in any way encouraged the adoption of that system, or by any act or word induced the city authorities to so direct the sewers that the flow from them should reach his premises. There is no finding to that effect, and the record contains no evidence. In fine, the case comes within the general rule, which gives to a person injured by the pollution of air or water, to the use of which, in its natural

condition, he is entitled, an action against the party, whether it be a natural person or corporation who causes that pollution."

Cases cited by defendants' counsel, where injunctions were refused to aid in the suppression of public nuisances, were cases where the act complained
*248 of was fully completed, and where * the nuisance was not one resulting from conduct repeated from day to day. Most of them were cases of purpresture, and concerned permanent structures already existing when courts in equity were appealed to.

The bill in this case does not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway. What is sought is relief against the pouring of sewage and filth through it, by artificial arrangements, into the Mississippi River, to the detriment of the State of Missouri and her inhabitants, and the acts are not merely those that have been done, or which when done cease to operate, but acts contemplated as continually repeated from day to day. The relief prayed for is against not merely the creation of a nuisance but against its maintenance.

Our conclusion, therefore, is that the demurrers filed by the respective defendants cannot be sustained. We do not wish to be understood as holding that, in a case like the present one, where the injuries complained of grow out of the prosecution of a public work, authorized by law, a court of equity ought to interpose by way of preliminary or interlocutory injunction, when it is denied by answer that there is any reasonable foundation for the charges contained in the bill. We are dealing with the case of a bill alleging, in explicit terms, that damage and irreparable injury will naturally and necessarily be occasioned by acts of the defendants, and where the defendants have chosen to have their rights disposed of, so far as the present hearing is concerned, upon the assertions of this bill.

We fully agree with the contention of defendants' counsel that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which is apprehended will create a nuisance of which its complainant may complain, the proofs must show such a state of
*249 facts as will manifest the danger to be real and immediate. * But such observations are not relevant to the case as it is now before us.

The demurrers are overruled, and leave is given to the defendants to file answers to the bill.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice White, dissenting:

Controversies between the States of this Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction, which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences, can be invoked, it must appear that the States are in direct antagonism as States. Clearly this bill makes out no such state of case.

If, however, on the case presented, it was competent for Missouri to implead the State of Illinois, the only ground on which it can be rested is to be found in the allegation that its Governor was about to authorize the water to be turned into the drainage channel.

The Sanitary District was created by an act of the General Assembly of Illinois, and the only authority of the State having any control and supervision over the channel is that corporation. Any other control or supervision lies with the law-making power of the State of Illinois, and I cannot suppose that complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which would bind the State of Illinois or control its action.

The Governor, it is true, was empowered by the act to authorize the water to be let into the channel on the receipt of a certificate, by commissioners appointed by him to inspect the work, that the channel was of the capacity and character required. This was done, and the water was let in on the day when the application was made to this court for leave to file the bill. The Governor had discharged his duty, and no official act of Illinois, as such, remained to be performed.

*250 Assuming that a bill could be maintained against the Sanitary * District in a proper case, I cannot agree that the State of Illinois would be necessary or proper party, or that this bill can be maintained against the corporation as the case stands.

The act complained of is not a nuisance, *per se,* and the injury alleged to be threatened is contingent. As the channel has been in operation for a year, it is probable that the supposed basis of complaint can now be tested. But it does not follow that the bill in its present shape should be retained.

In my opinion both the demurrers should be sustained, and the bill dismissed, without prejudice to a further application, as against the Sanitary District, if authorized by the State of Missouri.

My brothers HARLAN and WHITE concur with me in this dissent.[1]

State of Kansas v. State of Colorado.

Supreme Court of the United States, 1902.

[185 *United States,* 125.]

As the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.

Where a State on behalf of her citizens and in vindication of her alleged rights as an *126 individual owner files a bill against another State to obtain * relief in respect of being wholly deprived by the direct action of the latter of the water of a river accustomed to flow through and across her territory, and the consequent destruction of her property, and of the property of her citizens and injury to their health and comfort, the original jurisdiction of this court may be exercised.

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[1]For the succeeding phase of this case see *Missouri* v. *Illinois* (200 U. S. 496), *post* p. 1464,—Editor.

If it is a case of circumstances in which a variation between them as stated by the bill and those established by the evidence, might either incline the court to modify the relief or to grant no relief at all, the court, even though it sees that the granting of modified relief would be attended with considerable difficulty, will not support a demurrer.

The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by demurrer, but in a case of great magnitude, involving questions of grave and far-reaching importance, that rule will not be applied, and the case will be sent to issue and proofs.

THE State of Kansas, by leave of court, filed her bill of complaint against the State of Colorado on May 20, 1901, which, after stating that Kansas was admitted into the Union, January 29, 1861, and Colorado, August 1, 1876, averred:

That the Arkansas River rises in the Rocky Mountains in the State of Colorado and flows through certain counties of that State, and thence across the line into the State of Kansas; its tributaries in Colorado have their rise and entire flow in that State; the length of the river therein is approximately two hundred and eighty miles, and the drainage area of the river and its tributaries approximately twenty-two thousand square miles. All of the drainage area is east of the summit of the Rocky Mountains and a large portion thereof in the mountains, where the accumulation of snow in the winter season is very great, the waters from the melting of which flow into the river directly and in great volume from early spring until August in each year. The river, after leaving the mountains of Colorado, proceeds in an easterly course for approximately two hundred miles to the west line of Kansas, and "is a navigable stream under the laws and departmental rules and regulations of the United States." The volume of water in the bed of the river flowing from Colorado into Kansas formerly was and should now be, and would be, very large, but for the wrongful diversion of the same; said volume at its normal height in the river at the mean average flow for about ten months in the year being upwards of two thou-
*127 sand cubic feet per second, while it * is much less for about two months in the autumn in each year. The tributaries of the river in Kansas are comparatively few in number, and cannot furnish water to cause a continuous stream to flow in the bed of the river, except near the south line of the State, where the river passes into the Territory of Oklahoma. The river after entering Kansas proceeds through certain enumerated counties thereof, and then through the Territory of Oklahoma, the Indian Territory and the State of Arkansas, and empties into the Mississippi River at the eastern boundary of that State. From Fort Gibson, in the Indian Territory, to the mouth of the river it is a large, navigable stream, and is used for the purposes of trade and commerce by vessels plying thereon.

The length of the river in Kansas is about three hundred and ten miles; its course is through a broad valley, and along its entire length in Kansas are alluvial deposits of great depth, amounting in the aggregate to about two million five hundred thousand acres, the greater part of which acreage and greater part of the course of the river lying in the western part of the State. The elevation of the bed of the river through the State of Kansas is from three thousand three hundred and fifty feet above the level of the sea at the Colorado line to one thousand feet above that level at the point where it enters Oklahoma. The rainfall in the drainage area in the western half of the State of Kansas is very light,

and, by reason of the porous nature of the soil throughout that area, the greater portion of the water so falling sinks into the earth, and but a small portion thereof finds its way to the river except in the event of severe and unusual storms. The ordinary and usual rainfall in the major portion of the valley of the river in Kansas is utterly inadequate to the growing and maturing of cultivated crops of any kind, because the precipitation is very scanty, and does not fall during the growing season of the year.

The river in its entire course through the State of Kansas has a natural fall of about seven and three tenths feet per mile. Its valley is composed of sand covered with alluvial soil, and the river and the surface soil of the bottom lands in Kansas are all underlaid with sand and gravel, through which the waters of
*128 * the river have flowed from time immemorial, extending in width under the entire valley for its whole length throughout the State, the natural course and flow of the river being in and beneath the bed thereof and beneath the surface of the bottom lands of the entire valley of the river, that portion which flows beneath the surface being called the "underflow." The "underflow" is confined to and is co-extensive with the valley, and varies in volume with the amount of water in discharge in the river. The water which flows in the river from Colorado into Kansas furnishes the principal and almost the entire supply of water for the underflow of the valley, and at its normal height the underflow is of great and lasting benefit to the bottom lands, both as to those which abut on the river and as to those which do not; and is of great benefit to the people owning and occupying such lands, "for that it furnishes moisture sufficient to grow ordinary farming crops in the absence of rainfall, and furnishes water at a moderate depth below the surface, for domestic use and for the watering of animals. The flow of the water in the riverbed is also of great value to the people in the vicinity by reason of the fact that the evaporation therefrom tends to cool and moisten the surrounding atmosphere, thereby greatly promoting the growth of all vegetation, enhancing the value of the lands in that vicinity, and conducing directly and materially to the public health and making the locality habitable. Owing to the dryness of the climate, the cloudlessness of the sky, the high elevation, and the prevailing winds, evaporation is rapid and great, being about sixty inches per annum at the east end of the river valley in Kansas, and ninety inches at the west line of the State. Outside of the valley in the western half of the State of Kansas are several million acres of arid upland and plateau upon which grows a sparse but valuable grass upon which cattle may feed, and upon which they have, in times past, in vast numbers, been fed and fattened, but the cattle so fed must have watering places and such watering places must be in the river valley. And the availability and use of said arid lands and the prosperity of the business of cattle feeding thereon depends entirely upon the water, its
*129 convenience, depth, and supply, and if the surface flow of water in * the bed of said river be wholly cut off from the State of Kansas, then the underflow will gradually diminish and run out, and the valley of the Arkansas River will become as arid and uninhabitable as is the upland and plateau along its course, since without said underflow the valley land will be unfit for cultivation, and the arid lands unavailable for grazing."

The bottom lands in the valley of the Arkansas River in Kansas "are practically level and rise from six to fiteen feet above the water bed of the

river," and are such as are ordinarily termed "bottom lands." Nearly all of the bottom lands, including those which are adjacent to the bed of the river, are fertile and productive, valuable for farming purposes, and well adapted to the growing of corn, wheat, alfalfa, rye, etc., and "all like crops, grains and grasses usually grown in that latitude of the United States. In addition thereto, all of said lands are valuable for grazing purposes and well adapted to the support of vast numbers of cattle, horses, sheep, and hogs."

More than three fourths of these Kansas bottom lands were and are occupied by persons owning or leasing them, and residing thereon with their families; and more than two fifths, including more than two fifths of those on the river bank, are and have been for years in actual cultivation, with an agricultural population of more than fifty thousand, raising all products "common to the latitude and climate," while numerous cities, towns and villages are situated on the bank of the river, including ten county seats, with an aggregate population of over fifty thousand. The actual value of the Arkansas bottom lands averages not less than twenty-five dollars an acre, provided they receive the benefits arising from the natural and normal flow of the water of the river, but that by reason of the wrongful acts of the State of Colorado the value of the lands "has shrunk many millions of dollars, which has been a direct loss to the citizens of the State of Kansas, and to the taxable wealth, and to the revenues of the State of Kansas and to the school system of the State as hereinafter set forth."

The bill further averred that all of the bottom lands were originally part of the public domain of the United States, and that the State became enti-
*130 tled, on admission, for school purposes, to * sections sixteen and thirty-six of each township, some of which sections were situated within the valley, and a number of them adjoined the bed of the stream. That under the act of Congress of March 3, 1863, there was granted to the State practically all of the odd-numbered sections of land in the valley lying north of a line four miles south of the north line of township twenty-six, and the grant included all the territory of the Arkansas valley west of Wichita, being four fifths of the valley; that all the requirements of the act of Congress were complied with prior to 1874 by the State and by the Atchison, Topeka and Santa Fé Railroad Company, and the title in fee simple had been conveyed to the State and by the State to the railroad company and others, being not less than nine hundred thousand acres, a large portion of which abutted upon the river; that the even-numbered sections had been at all times subject to entry and have been taken and occupied by settlers under the land laws.

Prior to the admission of Kansas there were many settlers and residents in the valley, occupying and holding lands there, more particularly along the line of the Santa Fé trail, which followed the river from the present site of the city of Hutchinson to the west line of the State, and during the years 1869, 1870 and 1871, the entire Arkansas valley, from the south line of the State to the city of Great Bend, was taken and occupied by actual settlers, who subsequently acquired title to the lands under the United States, the State, and the railroad company; while the other valley lands from Great Bend to the west line of Kansas were taken up between 1872 and 1884, and have been since occupied by settlers and purchasers from the State and company. All of the lands of the valley have

been thus occupied, held and owned by the original settlers and their grantees, who have continuously held and owned all riparian and other rights in any way appertaining in or belonging to the lands.

The bill further averred that under an act of Congress of March 2, 1889, certain lots were transferred to the State of Kansas, and had been since used for the maintenance of a soldiers' home thereon, in accordance with the
*131 provisions of the * act; that these lands consisted of one hundred and twenty-six and fifty-six one hundredths acres of bottom lands of the valley, adjoining and abutting on the bed of the river, and were fertile and well adapted to the raising of fruits, grains and vegetables when supplied with moisture, but that the value thereof depended entirely on the flow of water in the bed of the river and on the underflow beneath the land. That the State was and had been during its entire ownership of the tract using a large portion of the same for raising grains, fruits, vegetables and grasses thereon for the needs of the institution, and as the owner was and had been since 1889 "entitled to the full, free and natural flow of all waters which naturally would flow in said river and beneath said land; and the rights of the State thereto are prior and superior to any right or claim of the State of Colorado accruing, acquired or established subsequent to said date."

It was also alleged that since 1885 the State of Kansas had been the owner of six hundred and forty acres situated in Reno County, on which it had erected a large institution for the purposes of an industrial reformatory, and that the greater portion of the lands were used for farming purposes in connection with the institution, and the production of grain, vegetables, etc., for its needs; that the lands are bottom lands in the valley of the Arkansas, furnished with moisture sufficient for the growing of crops thereon solely from the underflow of the river, the rainfall in ordinary seasons being entirely inadequate; and that the title of the State's grantors dated from 1873. And "by reason of the foregoing, the State of Kansas is entitled to the full natural flow of the water of the Arkansas River in its accustomed place and at its normal height and in its natural volume underneath all of the said reformatory lands. The rights of the State thereto relate back to May 19, 1873, and are prior and superior to any right or claim of the State of Colorado accruing, acquired or established subsequent to said date."

The bill further averred that the constitution of the State of Colorado provided in sections five and six of article sixteen as follows:

*132 "SEC. 5. The water of every natural stream not heretofore * appropriated within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the uses of the people of the State subject to appropriation as hereinafter provided.

"SEC. 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

That the legislature of Colorado has from time to time passed numerous laws purporting to authorize the diversion of water from the Arkansas River and its tributaries, in that State, for uses and purposes other than domestic; "more particularly for the purpose of irrigating arid and waste lands for agricultural purposes in said State." That in and by its laws and through its officers and courts Colorado has assumed "to grant to divers persons, firms and corporations the right and authority to divert the waters of the Arkansas River and its tributaries in Colorado from their natural channels, and to cause said waters to flow into and through canals and ditches constructed for the purpose, extending great distances away from the natural channels of said streams, and to store said waters and to empty the same upon high arid lands, not riparian to said streams, where large portions of such waters are lost from evaporation, and the remainder sinks into the earth, as a result of which, all of said waters are forever lost to such streams and are thus and thereby prevented from flowing into or through the State of Kansas."

That in pursuance of the constitutional provisions and the statutes of Colorado, many persons, firms and corporations claim to have acquired rights to divert water from the river and its tributaries for the purpose of irrigating arid, non-riparian lands in that State, each of them owning one or more ditches or
*133 canals, some being of great capacity and many miles in length. * And many of these persons, firms and corporations "have constructed great reservoirs within which to store, and in which are stored for use, vast quantities of the water of said streams before using it for the purpose of irrigation."

That these ditch owners and the State of Colorado are now diverting the waters flowing in the bed of the Arkansas River and its tributaries, and carrying them to great distances from their natural courses, and discharging them for agricultural purposes on "arid and non-riparian lands, where such waters are wholly lost to such streams and to the State of Kansas and its inhabitants. That such diversion is carried to such an extent that no water flows in the bed of said river from the State of Colorado into the State of Kansas during the annual growing season, and the underflow of said river in Kansas is diminishing and continuing to diminish, and if the said diversion continues to increase, the bottom lands of said valley will be injured to an enormous extent, and a large portion thereof will be utterly ruined and will become deserted and be a part of an arid desert."

That the State of Colorado, through its laws, legislatures, officers and agents, assumes to authorize canal and ditch owners to take, carry away, and so use the waters of the streams, and to regulate and control the distribution thereof to landowners for irrigation purposes; that other canals and ditches for the irrigation of arid, non-riparian lands are contemplated, and the extension of branches and laterals; that this system is being continuously carried on in the drainage area of the Arkansas valley, and that unless restrained therefrom Colorado will grant additional rights for the construction of other canals and ditches sufficient to divert all the water in the river so that none will flow into Kansas.

That Colorado has since 1890 constructed and owns and manages a great canal for diverting water of the Arkansas River from its channel, and using it on arid, non-riparian lands, so that it will not return to or again flow in the river; and the State permits its agents to divert into said canal water to the

*134 amount of seven hundred and fifty-six and twenty-eight one * hundredths cubic feet per second, which is approximately the natural flow of the river at the place of the diversion.

That the water so diverted is sold by the State of Colorado to persons owning lands in the vicinity and is used by such owners in irrigating arid, non-riparian lands, when but for the diversion it would flow into Kansas and through said valley.

That the State of Colorado is threatening to build, and will build unless restrained, other similar canals with the intention of diverting other large quantities of water from the river, and irrigating other arid, non-riparian lands, and the legislature of that State has authorized their construction; and the State of Colorado also intends to, and will, unless restrained, extend its existing canal and build branches and laterals.

That Colorado has by legislation appropriated large sums of money for the construction of reservoirs for the storage of water from the streams tributary to the Arkansas River, and provided for the control thereof, and the sale of the waters so stored for the irrigation of arid lands, non-riparian to the streams from which the waters are taken. That the State has constructed and is using four of such reservoirs holding vast quantities of water which would otherwise flow into the State of Kansas; and by reason of the use of those waters no portion thereof is permitted to return to its natural channel or flow in the river. That the State of Colorado is now preparing to construct, and intends to construct, and, unless restrained, will construct, at various points along the river and its tributaries, vast reservoirs in which to further store and hold the natural and flood waters of said stream; "and it is the intention and expectation of said State so to store and withhold and divert from the channel of said river all of the water thereof." That surveys for these reservoirs had been made and plans and specifications were being prepared for their construction, and the State is preparing to enter on the construction thereof. That if these reservoirs are so constructed by Colorado vast and enormous quantities of water which would otherwise flow into the State of Kansas will be taken and held and sold and used for the irrigation of arid and non-riparian lands not now irrigated, and will be forever lost to the river and the State of Kansas, which will *135 cause in * Kansas in said valley a vast and ruinous decline in agriculture, and great diminution of the wealth and revenues of the State, and in its population and prosperity.

Complainant charged the facts to be "that it is the intention of the State of Colorado to divert absolutely all of the water that does, can or might flow down the Arkansas River into the State of Kansas, so that all of the water shall be used in the State of Colorado, and none whatever, either above or below the surface, that may by any possibility be utilized, shall cross the line into the State of Kansas, all to the great profit and advantage of the State of Colorado; and to the great damage and injury of the State of Kansas."

It was further stated that when the Territory of Kansas was organized in 1854 it extended from its present eastern boundary to the summit of the Rocky Mountains, and all of the present drainage area of the Arkansas River in Colorado was then included therein, and during all of the period from then to the organization of the State of Kansas the water of the river was wholly unappro-

priated, and the common law and the riparian rights herein claimed extended over the whole of the Arkansas valley and to the summits of the Rocky Mountains, and had for many years prior thereto. That by reason of the prior settlement. occupation and title of the inhabitants of Kansas upon and to the lands situated in the valley of said river, including those upon its banks, Kansas and the owners of land in the valley acquired, and now have the right to the uninterrupted and unimpeded flow of all the waters of the river into and across the State of Kansas; which rights accrued prior to any of the diversions by or in Colorado, and prior to the accruing of any of the rights claimed by that State, or by persons, firms or corporations therein now taking water from the river or its tributaries.

The bill further averred that the State of Colorado and the various persons, firms and corporations engaged in taking waters from the river and its tributaries under and in pursuance of authority granted by the State of Colorado, have by so doing wrongfully, illegally and unlawfully diverted the water from the
*136 accustomed channel across the State of Kansas, and have * greatly damaged and irreparably injured the State of Kansas and its inhabitants. That by reason of such diversion the fertility of all the valley lands in Kansas, including those on the river banks as well as others, has been greatly diminished, and the crops, trees and vegetation have languished and declined, and in many places perished, and wells which should furnish water for domestic use and animals have become dry. That these damages are the proximate and necessary result of the diversion of the waters, and that such damage amounts to vast sums annually, which damages have increased year by year for the past ten years, substantially in proportion as the diversion of the waters in the State of Colorado has increased.

It was also stated that by reason of the diversion of the waters as described, during the summer season and the dry portion of the year, the bed of the river in Kansas above the city of Wichita becomes practically, and oftentimes wholly dry, and because of the natural features of the territory through which the stream passes, which are set forth, the channel becomes filled up and great damage is inflicted at times of sudden and excessive rain fall in Kansas or sudden and excessive melting of snows in Colorado.

That the property of complainant, situated on the banks of the river and used for the purposes of a soldiers' home, has been greatly damaged and specially injured by reason of the diversion of the water, which would otherwise flow by and underneath the said tract of land, and unless the natural and normal flow is restored the value of the property will be entirely destroyed. And that the same is true of complainant's property used for the purposes of a state industrial reformatory.

The bill further averred that a large number of irrigation canals and ditches, now wrongfully used in diverting the waters of the Arkansas River and its tributaries from their accustomed channels in Colorado, are owned and operated by domestic corporations organized for that purpose under the laws of Colorado with limited periods of existence and that if Colorado be not restrained from doing so she will grant extensions of the charters now held, and also grant other and new charters to corporations organized for the purpose of
*137 unlawfully and wrongfully * diverting and using said waters for irrigation

purposes, all to the irreparable injury of the State of Kansas and its inhabitants.

The bill then prayed "that a decree may be entered prohibiting, enjoinng and restraining the State of Colorado from granting, issuing, or permitting to be granted or issued hereafter, any charter, license, permit or authority to any person, firm or corporation for the diversion of any of the waters of the Arkansas River or of any of its tributaries from their natural beds, courses and channels within the State of Colorado, except for domestic use; and from granting to any person, firm or corporation any right to extend or enlarge any of the canals or ditches now existing; or to construct and operate any other canals, ditches, branches, laterals or reservoirs in addition to those heretofore constructed and now in use in said State."

"That the said State of Colorado may be prohibited, enjoined, and restrained, as a State, from itself constructing, owning, or operating, either directly or indirectly, any canal or ditch whereby the waters of said river, or any of its tributaries, shall be diverted from their natural courses and channels; and from constructing, owning, operating or using any reservoir for the storage of the waters of said river, or any of its tributaries, for purposes of irrigation."

"That the said State of Colorado may be prohibited, enjoined and restrained from granting to any person, firm or corporation any extension of any charter, license, permit, or authority, of any kind or nature whatsoever, for the diversion of any of said waters from said river or its tributaries for irrigation purposes, or for the continuance of such diversion thereof after the charter, license, permit or authority theretofore granted for that purpose shall have expired."

And for general relief.

Thereupon, October 15, 1901, the State of Colorado, by leave, filed its demurrer to the bill of complaint, assigning the following causes:

"First. That this court has no jurisdiction of either the parties to or the subject matter of this suit because it appears on the face of said bill of
*138 complaint that the matters set forth * therein do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Kansas and the State of Colorado.

"Second. Because the allegations of said bill show that the issues presented by said bill arise, if at all, between the State of Kansas and certain private corporations and certain persons in the State of Colorado who are not made parties herein and which matters so stated, if true, do not concern the State of Colorado as a corporate body or State.

"Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals who reside in the said State of Kansas on the banks of the Arkansas River and that although the said suit is attempted to be prosecuted for and in the name of the State of Kansas, said State is in fact loaning its name to said individuals and is only a nominal party to said suit and that the real parties in interest are the said private parties and persons residing in said State.

"Fourth. Because it appears from the face of said bill that the State of Kansas in her right of sovereignty is seeking to maintain this suit for the redress of the supposed wrongs of certain private citizens of said State while

under the Constitution of the United States and the laws enacted thereunder, said State possesses no such sovereignty as empowers it to bring an original suit in this court for such purposes.

"Fifth. Because it appears upon the face of said bill of complaint that no property rights of the State of Kansas are in any manner affected by the matters alleged in said bill of complaint; nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

"Sixth. Because it appears from the fact of said bill of complaint that the acts complained of are not done by the State of Colorado or under its authority, but by certain private corporations and individuals against whom relief is sought and who are not made parties herein.

"Seventh. The bill is multifarious in this, to wit; that thereby the State of Kansas seeks to determine the claims of the State of Kansas as a riparian owner against the claims of the State of Colorado as an appropriator of water;
*139 the claims of the State * of Kansas as a riparian owner against the separate and several claims of numerous undisclosed Colorado appropriators of water; the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the claims of the State of Colorado as an appropriator of water; and the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the separate and severable claims of numerous undisclosed Colorado appropriators; and otherwise, as is apparent from the bill.

"Eighth. Because the acts and injuries complained of consist of the exercise of rights and the appropriation of water upon the national domain in conformity with and by virtue of divers acts of Congress in relation thereto.

"Ninth. Because the constitution of the State of Colorado declaring public property in the waters of its natural streams and sanctioning the right of appropriation was enacted pursuant to national authority and ratified thereby at the time of admission of the State into the Union.

"Tenth. Said bill of complaint is in other respects uncertain, informal and insufficient and does not state facts sufficient to entitle the State of Kansas to the equitable relief prayed for."

The demurrer was set down for argument, and duly argued February 24 and 25, 1902.

Mr. A. A. Goddard and *Mr. Eugene F. Ware* for the State of Kansas. *Mr. S. S. Ashbaugh* was on their brief.

Mr. Luther M. Goddard, Mr. Platt Rogers and *Mr. Charles S. Thomas* for the State of Colorado. *Mr. Charles C. Post* and *Mr. Henry A. Dubbs* were on their brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The original jurisdiction of this court over "controversies between two or more States" was declared by the judiciary act of 1789 to be exclusive, as in its nature it necessarily must be.
*140 Reference to the language of the Constitution providing for * its exercise, to its historical origin, to the decisions of this court in which the subject has received consideration, which was made at length in *Missouri* v. *Illinois*,

180, U. S. 208, demonstrates the comprehensiveness, the importance and the gravity of this grant of power, and the sagacious foresight of those by whom it was framed. By the first clause of section 10 of article I of the Constitution it was provided that "No State shall enter into any treaty, alliance, or confederation;" and by the third clause that "No State shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Treaties, alliances and confederations were thus wholly prohibited, and Judge Tucker in his Appendix to Blackstone (vol. 1, p. 310) found the distinction between them and "agreements or compacts" mentioned in the third clause, in the fact that the former related "ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time," but agreements or compacts concerned "transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties." But Mr. Justice Story thought this an unsatisfactory exposition, and that the language of the first clause might be more plausibly interpreted "to apply to treaties of a political character, such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;" while compacts and agreements might be very properly applied "to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundaries; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other." 2 Story, Const. §§ 1402, 1403; *Louisiana* v. *Texas,* 176 U. S. 1.

*141 Undoubtedly as remarked by Mr. Justice Bradley in *Hans* * v. *Louisiana,* 134 U. S. 1, 15, the Constitution made some things justiciable, "which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution." And as the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.

In *Missouri* v. *Illinois and The Sanitary District of Chicago,* 180 U. S. 208, it was alleged that an artificial channel or drain constructed by the sanitary district for purposes of sewerage under authority derived from the State of Illinois, created a continuing nuisance dangerous to the health of the people of the State of Missouri, and the bill charged that the acts of defendants, if not restrained, would result in poisoning the water supply of the inhabitants of Missouri, and in injuriously affecting that portion of the bed of the Mississippi River lying within its territory. In disposing of a demurrer to the bill, numerous cases involving the exercise of original jurisdiction by this court were examined, and the court, speaking through Mr. Justice Shiras, said: "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting

the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court. An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State, but it must surely be conceded that, if the health and comfort of the inhabitants of a State are
*142 threatened, the * State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering. The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State. That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

As will be perceived, the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

In the case before us, the State of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action and not the action of state officers in abuse or excess of their powers.

*143 * The State of Colorado contends that, as a sovereign and independent State, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that as the sources of the Arkansas River are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the State of Kansas the same position that foreign States occupy toward each other,

although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences, power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent States in their relations to each other; that by the law of Nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between States; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining State, and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld.

But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The States of this Union cannot make war upon each other. They cannot "grant letters of marque and reprisal." They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.

As Mr. Justice Baldwin remarked in *Rhode Island* v. *Massachusetts:*

*144 * "Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact." 12 Pet. 657, 726.

"War," said Mr. Justice Johnson, "is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails, can only derive validity from treaty stipulations." *Harcourt* v. *Gaillard,* 12 Wheat 523, 528.

The publicists suggests as just causes of war, defence; recovery of one's own; and punishment of an enemy. But as between States of this Union, who can determine what would be a just cause of war?

Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty; but if a State of this Union deprives another State of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?

Applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might not exist which would justify our interposition, while the manifest importance of the case and the necessity of the ascertainment of all the facts before the propositions of law can be satisfactorily dealt with, lead us to the conclusion that the cause should go to issue and proofs before final decision.

The pursuit of this course, on occasion, is thus referred to by Mr. Daniell (p. 542): "The court sometimes declines to decide a doubtful question of title on demurrer; in which case, the demurrer will be overruled without prejudice to any question. * A demurrer may also be overruled, with liberty to the defendant to insist upon the same defense by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in. . . . A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may, either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer."

*145

Without subjecting the bill to a minute criticism, we think its averments sufficient to present the question as to the power of one State of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.

We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that, such appropriate decree as the facts might be found to justify, could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that were also essential. *Tayloe* v. *Merchants' Insurance Company,* 9 How. 390, 406; Daniell, Ch. Pr. (4th Am. ed.) 380.

Advancing from the preliminary inquiry, other propositions of law are urged as fatal to relief, most of which, perhaps all, are dependent on the actual facts. The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by the demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.

*146

The gravamen of the bill is that the State of Colorado, acting * directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas River through its channel on the surface, and through a subterranean course, across the State of Kansas; that this is threatened not only by the impounding, and the use of the water at the river's source, but as it flows after reaching the river. Injury, it is averred, is being, and would be, thereby inflicted on the State of Kansas as an indidividual owner, and on all the inhabitants of the State, and especially on the inhabitants of that part of the State lying in the Arkansas valley. The injury is asserted to be threatened, and as being wrought, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado in doing this is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

The State of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream, and while she concedes that this rule has been modified in the Western States so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other States and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

*147 Sitting, as it were, as an international, as well as a domestic * tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River in Kansas; whether what is described in the bill as the "underflow" is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties thereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas River; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof.

The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence.

Demurrer overruled, without prejudice to any question, and leave to answer.

Mr. Justice Gray did not hear the argument, and took no part in the decision.[1]

State of Tennessee v. State of Virginia.

Supreme Court of the United States, 1903.

[190 *United States,* 64.]

Report of commissioners appointed to ascertain, retrace, re-mark and reëstablish the real, certain and true boundary line between the States of Tennessee and Virginia from White Top Mountain to Cumberland Gap confirmed.

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[1]For the final phase of this case see *Kansas* v. *Colorado* (206 U. S. 46), *post* p. 1525.—Editor.

A compact having been entered into by the States of Tennessee and Virginia expressed in concurrent laws of said States which received the consent of Congress, this court modifies the line delineated in the report of the commissioners as to so much thereof as is affected thereby, and that portion of the line is determined, fixed and established in accordance with such compact.

The commissioners having ascertained and recommended the straight line from the end of the "diamond-marked" compact line of 1801–1803 to the corner of the States of North Carolina and Tennessee as the true boundary line between the States of Virginia and Tennessee between those two points, this court approves and adopts such recommendation.

THE proceedings appear in the decree of the court.

Mr. Charles T. Cates, Jr., attorney general of the State of Tennessee, for complainant.

Mr. William A. Anderson, attorney general of the State of Virginia, for defendant.

MR. CHIEF JUSTICE FULLER announced the decree of the court.

This cause came on to be heard on May 18, 1903, on the proceedings heretofore had herein, and upon the report of William C. Hodgkins, James B. Baylor and Andrew H. Buchanan, commissioners appointed by the decretal order herein of April 30, 1900, to ascertain, retrace, re-mark and reëstablish the real, certain and true boundary line between the States of Tennessee and Virginia, as actually run and located from White Top Mountain to Cumberland Gap, under
*65 proceedings had between * the two States in 1801–1803, and as adjudged and decreed by this court in its decree of April 3, 1893, in a certain original case in equity, wherein the State of Virginia was complainant and the State of Tennessee was defendant; which report is annexed hereto and made part hereof.

And it appearing to the court that said report was filed in this court on the 5th day of January, 1903, and that the same is unexcepted to by either party in any respect; therefore, upon the motion of the State of Tennessee, by her Attorney General, and of the State of Virginia, by her Attorney General, it is ordered that said report be, and the same is hereby, in all things confirmed.

It is thereupon ordered, adjudged and decreed that the real, certain and true boundary line between the States of Tennessee and Virginia, as actually run and located under the compact and proceedings had between the two States in 1801–1803, and as adjudged by this court on the third day of April, 1893, in said original cause in equity, wherein the State of Virginia was complainant and the State of Tennessee was defendant as aforesaid, was at the institution of this suit, and now is, except as hereinafter shown, as described and delineated in said report filed herein on January 5, 1903, as aforesaid.

And it further appearing to the court, and it being so admitted by both parties, that since the institution of this suit and the decretal order of April 30, 1900, as aforesaid, a compact was entered into by the States of Tennessee and Virginia, expressed in the concurrent laws of said States, namely, the act of the general assembly of Tennessee, approved January 28, 1901, entitled "An act to

cede to the State of Virginia a certain narrow strip of territory belonging to the State of Tennessee, lying between the northern boundary line of the city of Bristol, in the county of Sullivan, and the southern boundary line of the city of Bristol, in the County of Washington, State of Virginia, being the northern half of Main street, of the said two cities," and the reciprocal act of the general assembly of Virginia approved February 9, 1901, entitled "An act to accept the cession by the State of Tennessee to the State of Virginia, of a certain narrow
*66 strip of territory claimed as belonging to * the State of Tennessee, and described as lying between the northern boundary line of the city of Bristol, in the county of Sullivan, State of Tennessee, and the southern boundary line of the city of Bristol, in the county of Washington, State of Virginia, being the northern half of the Main street of the said two cities."

And it further appearing that said compact received the consent of the Congress of the United States by joint resolution approved March 3, 1901, as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That a recent compact or agreement having been made by and between the States of Tennessee and Virginia, whereby the State of Tennessee, by an act of its legislature approved January twenty-eighth, nineteen hundred and one, ceded to the State of Virginia certain territory specifically described in said act and being the northern half of the main street between the cities of Bristol, Virginia, and Bristol, Tennessee, and the State of Virginia, by act of its general assembly, approved February ninth, nineteen hundred and one, having accepted said cession of the State of Tennessee, the consent of Congress is hereby given to said contract or agreement between said States fixing the boundary line between said States as shown by said acts referred to, and the same is hereby ratified."

And said commissioners, in their said report, having ascertained and recommended the straight line from the end of the "diamond-marked" or compact line of 1801–1803 to the corner of the States of North Carolina and Tennessee as the true boundary line between the States of Virginia and Tennessee between those two points, the court, approving said recommendation and finding of said commissioners, doth adopt the same.

And the court, being of opinion that it is proper to recognize the line so established by said last-mentioned compact of 1901 as the real, certain, and true interstate boundary line within and between said two cities, and to definitely determine and fix in this cause what is the real, true and certain boundary
*67 line between said States throughout the entire length thereof * from the corner of the States of North Carolina and Tennessee, on Pond Mountain, to the corner of Virginia and Kentucky, at Cumberland Gap, doth therefore adjudge, order, and decree that the entire real, certain, and true boundary line between the States of Tennessee and Virginia is the line described and delineated in said report filed herein on January 5, 1903, modified as to so much of said line as lies between the two cities of Bristol, by the aforesaid compact of 1901 between the two States, and as so described, delineated, and modified said boundary line from the said North Carolina corner to the eastern end of the compact line of 1801–1803, known as the "diamond-marked" line, and thence to Cumberland Gap, is hereby determined, fixed, and established.

It is further ordered, adjudged and decreed that the compensation and expenses of the commissioners and the expenditures attendant upon the discharge of their duties be, and they are hereby, allowed at the several sums set forth in their report, as hereinbefore confirmed, and that said charges and expenses, together with all the costs of this suit to be taxed, be equally divided between the parties hereto.

Is is further ordered that the clerk of this court do, at the proper charges of the parties to this cause, deliver fifty printed copies of this decree including said report to the Attorney General of each of said States.

The report of the commissioners, filed January 5, 1903, is as follows:

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your commissioners, appointed by the decree of this honorable court, dated April 30, 1900, to ascertain, retrace, re-mark and reëstablish the boundary line established between the States of Virginia and Tennessee, by the compact of 1803, which was actually run and located under proceedings had by the two States in 1801–1803, and was then marked with five chops in the shape of a diamond, and which ran from White Top Mountain to Cumberland Gap, respectfully represent that they have completed the duties assigned to them by
*68 the said * decree of April 30, 1900, that they have retraced and remarked the said boundary line as originally run and marked with five chops in the shape of a diamond in the year 1802, and that for the better securing of the same they have placed upon the said line, besides other durable marks, monuments of cut limestone four and a half feet long and seven inches square on top, with V's cut on their north faces and T's on their south faces, set three and a half feet in the ground, conveniently located as hereinafter more fully described, so that the citizens of each State and others, by reasonable diligence, may readily find the true location of said boundary; all of which is more particularly set forth in the detailed report of their operations, which your commissioners, herewith beg to submit, together with two maps explanatory of the same, a list of the several permanent monuments and other durable marks, and a complete bill of costs and charges. And your commissioners further pray that this honorable court accept and confirm this report; that the line as marked on the ground by said commissioners in the years 1901 and 1902 be declared to be the real, certain and true boundary between the States of Tennessee and Virginia; that your commissioners be allowed their expenses and reasonable charges for their own services in these premises, as shown on the bill of costs which forms a part of this report; and finally that your commissioners be discharged from further proceedings in these premises.

WILLIAM C. HODGKINS, [SEAL.]
Commissioner.
JAMES B. BAYLOR, [SEAL.]
Commissioner.
ANDREW H. BUCHANAN, [SEAL.]
Commissioner.

Detailed report of the operations of the commission appointed by the Supreme Court of the United States, April 30, 1900, to retrace and re-mark the boundary line between the States of Tennessee and Virginia.

At the date of the above decree and for several months thereafter the
*69 State of Virginia had no funds available for the proceedings * ordered by the court, and none could be had until there could be a session of the state legislature to make the needed appropriation. It was therefore necessary for your commissioners to seek an extension of the time within which they might make their report and upon the motion of the Attorney General of Virginia an extension was granted until the next term of court.

At a session of the General Assembly of Virginia, held in the winter of 1900–1901, the sum of five thousand dollars was appropriated for the purpose of paying Virginia's share of the expenses of this boundary survey.

The Tennessee legislature had previously made a like appropriation.

Your commissioners therefore made preparations for beginning the execution of their duties under your decree of April 30, 1900, as early in the season of 1901 as the weather conditions should permit.

The commission held its first meeting at Washington, D. C., on May 16, 1901, and organized by choosing William C. Hodgkins, of the State of Massachusetts, as chairman; James B. Baylor, of the State of Virginia, as secretary, and Andrew H. Buchanan, of the State of Tennessee, as treasurer.

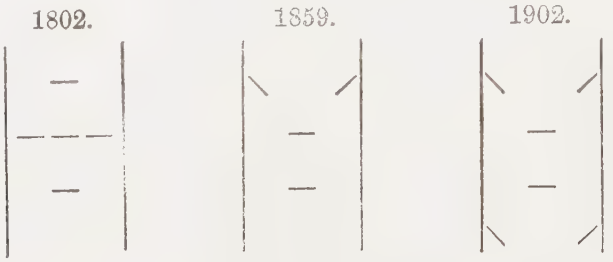
At this meeting there was a full discussion of the problem presented and of the method of work which might be most suitable under all the conditions. Arrangements were also made for procuring the necessary camp outfit and supplies.

Through the courtesy of the Superintendent of the U. S. Coast and Geodetic Survey, your commissioners were able to procure from that bureau, without charge, not only the outfit of tents and camp furniture required for the shelter and comfort of the party, but also the valuable instruments needed for the survey.

This relieved the States of Tennessee and Virginia of a considerable expense which would otherwise have been unavoidable. The two States were spared another heavy item of expense by the fact that each of your commissioners is a civil engineer and entirely familiar with work of this nature. It was, therefore, unnecessary to follow the usual course of employing
*70 * engineers or surveyors to carry out the field-work under the direction of the commissioners. Instead of that, your commissioners themselves conducted all the field-work, hiring only such rodmen, axemen, etc., as were necessary from time to time. By such methods and by exercising rigid economy in all of their expenditures, your commissioners have been able to complete the entire work, including the setting of cut-stone monuments, and also including the amount charged for their own remuneration, for the sum of $9475.99, which is but little more than the amount charged to the State of Virginia alone by the joint commission of 1858–1859.

It having been decided at the first meeting of the commission that the most convenient place for beginning field operations would be the city of Bristol, which is located directly upon the boundary line, the commission adjourned to that place.

Field-work was begun on May 22, 1901, with the examination of a portion of the line east of Bristol, where a number of trees were found which bore the marks of the surveys of 1802 and 1858–'59. As there has been considerable controversy and conflicting testimony in regard to the nature of these old marks, it may be well to show by diagrams and photographs the actual arrangement and appearance of those of both years, as well as of the somewhat different mark which was used for the present re-marking by your commissioners.



While the marks made in 1858–'59 are still numerous in forested areas and are generally easily distinguishable, those made in 1802 are becoming scarce and sometimes are barely discernible when found.

*71 * This is shown in the accompanying photograph of a large white-oak tree, upon which the marks of 1858–'59 can readily be traced, while only three of those made in 1802 can be distinguished and those with difficulty. The marks of 1802 were apparently made with a small and light hatchet and on many trees which have a thick and rough bark the hatchet does not seem to have reached the wood and in such cases the gradual exfoliation of the bark has often nearly or entirely obliterated the mark. Where the wood was wounded a small burr has formed which can nearly always be recognized, but cuts which did not completely penetrate the bark have sometimes disappeared.

The marks left by the survey of 1858–'59 were found of very great value as guides to the older "diamond" marks of 1802. Both marks were often found on the same tree and it was a rare occurrence to find the diamond mark without the mark of 1859, either above or below it. In fact, it was very soon noticed that the mere fact of finding the mark of 1858–'59 either above or below the normal position on a tree was an almost certain indication that a diamond mark had been found there at the date of the later marking, even though, through the action of time and the elements, all vestiges of it may now have disappeared. Since the date of the last survey, very many marked trees have been destroyed through various agencies, especially since the more rapid development of this section in recent years has caused a greater demand for lumber, and in some places the trees bearing the old marks are so far apart and the marks themselves are so faint that great trouble and delay would often have been experienced in the search for these old marks had it not been for the aid afforded by the marks of 1858–'59, which always proved reliable guides by which to find the older marks.

In this connection it may not be inappropriate for your commissioners to state that they everywhere found that the joint commission of 1859 did its work

in a careful and conscientious manner, and that they believe its line, as marked on the growing timber, is identical with that marked by the joint com-
*72 mission * of 1802, and that full credence should be given to statements of fact in the report of that survey.

From a point about a mile and a quarter east of Bristol, the line was traced without difficulty, other than that due to the broken nature of the country traversed, as far as the beginning of what is commonly known as the Denton Valley offset.

At this point occurs the greatest and most remarkable irregularity in the whole course of this line, there being a deflection from the direct course of 66° 10′ for a distance of 8715.6 feet. The portion of the boundary east of the offset is further north than that west of the offset, so that the deflection is to the south in going westward from the eastern end of the line, the direction in which it was originally run out, or to the north in working eastward from Bristol, as was done in the present survey for reasons of convenience. In either case, the deflection is to the left hand; but it is not the same in each case, as the two portions of the line east and west of the offset are not exactly parallel to each other. This difference of direction amounts to 1° 30′ as shown on the map of the line accompanying this report.

Owing to the long controversy over this offset and the persistent assertions of certain parties that marked timber would be found on the eastern prolongation of the portion of the line extending from Bristol to Denton's Valley, if the same were run out, your commissioner felt obliged, in order to settle the question for all time, to run out this line and make a careful search for marked timber along its course. This was accordingly done, and a careful examination of the timber on each side of the transit line was made as the work progressed; but with only negative results.

Although several weeks were spent in running this line across the series of very rough and heavily timbered mountains lying between Denton's Valley and Pond Mountain, near the corner of North Carolina, and although every story brought to the commissioners by people interested in the result was carefully examined, your commissioners were utterly unable to find or to have pointed out to them one authentic mark of the line of 1802, either on this line or anywhere in its vicinity.

*73 * On the other hand, the "offset line" and the portion of the line running eastward from the offset to the vicinity of the White Top Mountain were found well marked; both the 1802 and the 1858–'59 marks were found at frequent intervals.

In order to be assured that these marks were authentic, blocks were cut from several of these trees, at different points on said offset line, and the ages of the marks were determined by counting the rings of the annual growth. These tests showed that the marks were of the supposed age. The ages of the most important marks were verified by the U. S. Bureau of Forestry. As was found in 1858–'59 the marking of the timber ceased (or began) on a comparatively low eminence, known as Burnt Hill, which from the neighboring heights of White Top or of Pond Mountain seems to be in the bottom of a hollow.

The apparent discrepancy between this situation and the language of the report of the joint commission of 1802, which reads—"Beginning on the summit

of the mountain generally known as the White Top Mountain," etc., has led some to suppose that the line should be extended further east, to the summit of the so-called "divide" or watershed between the tributaries of the Holston and New Rivers.

There seems, however, nothing to support this theory except the somewhat hazy idea that the eastern end or point of beginning of this line ought to be on a summit.

As a matter of fact, the actual end of the line on Burnt Hill is on quite as much of a summit as if it had been on the "divide," which in this place is so low and flat as to be scarcely perceptible as an elevation of any importance. It certainly could never be supposed to be the summit of White Top Mountain, which towers far above it, its huge, dome-like bulk filling the northeastern horizon.

No marked trees of 1802 or of 1858–'59 could be found east of Burnt Hill, though the line was produced through heavy timber of original growth to the "divide" and careful search was made for them. The same condition was found in 1859, as reported by the commission of that year. A point which that commission seems to have overlooked is the important fact that the eastern
*74 end of the marked line at Burnt Hill is almost * exactly in line between the corner of North Carolina, on Pond Mountain, and the summit of White Top Mountain. What more likely than that the commissioners of 1802, who agreed to lay out a line equally distant from the older lines, known as Walker's and Henderson's and beginning on the summit of the mountain generally known as the White Top Mountain, should begin at the point where the Walker line reached the northwestern corner of North Carolina, and where accordingly the jurisdiction of Tennessee should begin, and run thence in the direction of the most important peak to the northward and eastward until they reached the desired middle point between the lines of Walker and Henderson, and from that point started on their westerly course. It is hard to understand why they should have omitted to mark this part of their line; but this small bit of boundary, extending from the northeast corner of Tennessee to the northwest corner of North Carolina, seems to have been somewhat overlooked in more recent proceedings. Your commissioners respectfully recommend that the straight line between these two points be declared to be the boundary, believing, as they do in the absence of any marks to the contrary, that this was the original and true line. All of this section is composed of very rugged and densely wooded mountains with but a scanty population.

The progress of the work in this mountainous and almost inaccessible region was delayed not only by the nature of the country and by the fact that in this very worst part of the whole line it was necessary to run out these two independent lines, doubling the labor to be expended, but also by the unfortunately rainy weather which was experienced. The frequent and heavy rains often stopped field-work, washed the few roads so badly that they became almost impossible and raised the streams so high that sometimes for days at a time it was impossible to ford them.

It was not until September 21 that your commissioners were able to close work in the White Top region and return to Bristol to start westward from that place toward Cumberland Gap.

For the remainder of the season, however, both the weather and the
*75 nature of the country were much more favorable for * field operations and excellent progress was made, though it was impossible to entirely complete the work before the approach of winter.

So far as the portion of the boundary passing through the central part of the city of Bristol is concerned, the labors of your Commissioners were forestalled by a special act of the General Assembly of the State of Tennessee, approved January twenty-eighth, nineteen hundred and one, ceding to the State of Virginia the northern half of the main street of the two cities. The General Assembly of Virginia accepted the cession by an act approved February ninth, nineteen hundred and one, and the action of the two legislatures was subsequently ratified by the Congress and approved by the President of the United States, March third, nineteen hundred and one. This cession covers, however, but a small part of the boundary, extending only from the northwest corner of the old town of Bristol on the west to the western boundary of the Bristol cemetery on the east. As it is important to guard against the possible renewal of this long-standing controversy, and as the town is already extending beyond the above limits, it was deemed proper to mark the old diamond line by monuments, just as if there had been no legal change in the boundary for this short distance. But your commissioners regret to report that they have been unable to reach a unanimous conclusion in regard to the true location of the said diamond line within and near the above limits.

Commissioners Hodgkins and Buchanan, after careful study of all the evidence of record and after diligent examination of the ground, are of the opinion that the said diamond line of 1802–1803 runs from monument No. 25, near the first marked tree east of Bristol, in a straight line, to monument No. 26, on the western boundary of the Bristol cemetery and on the north line of Main or State street; thence along the northern line of said Main or State street to "a planted stone in the edge of a field formerly owned by Z. L. Burson, being the northwest corner of the corporate territory of the old town of Bristol," referred to
*76 in the act of cession, *supra;* and thence in a straight * line to monument No. 28 in the fork of the main road and near the first marked trees west of Bristol.

Commissioner Baylor, on the other hand, after equally careful consideration of all the evidence of record and diligent examination of the ground, is of the opinion that the said diamond line of 1802–1803 runs from monument No. 25, near the first marked tree east of Bristol, in a straight line to monument No. 27, situated just outside of the wall of the Bristol cemetery and on the middle line of Main or State street as it runs west from this point; and thence in a straight line along the middle of Main or State street to monument No. 28, near the center of the fork of the main road, and near the first marked trees of 1858–'59, west of Bristol.

The said line, running through the center of Main or State street, is just 30 feet south of monument No. 26 on the north property line of Main or State street, outside the western wall of Bristol cemetery.

Westward from Bristol, the boundary was retraced without difficulty by the marked trees, just as in the previous work to the eastward.

Only one marked deviation from the general course of the line was en-

countered during the remainder of the season. This was on the property formerly known as the Hickman place, in the vicinity of the village of Bloomingdale, Tennessee.

Here the line was found to have a deflection of 8° 30′ to the right, or north, for the distance of 3161.8 feet. From the western end of this offset, the line resumed its general westerly course, and so continued until the end of the work of that year. As the season advanced, it became evident that even under the most favorable conditions it would be impossible to complete the survey without working far into the winter, which on many accounts was undesirable.

The Attorneys General of the two States therefore joined in a request for a further extension of time within which your commissioners might file their report, and this honorable court thereupon extended that time until the opening of the October term, 1902.

*77 The field operations for the season of 1901 were closed at the * end of October, at which time the survey had been extended to the Clinch River, 43 miles east of Cumberland Gap, the total length of boundary retraced being 70 miles, besides 16 miles of trail line run on the extension of the "straight line" from Denton's Valley to Pond Mountain.

Before the opening of field-work for the season—1902, a complaint reached your commissioners from a citizen of Johnson County, Tennessee, supposed to be reliable, to the effect that interested parties were interfering with the marks placed on the line the previous year, and that in some cases at least the monuments had not been properly placed by the persons employed for that purpose.

Although these statements seem scarcely credible, in view of the general interest taken in the work by the inhabitants, your commissioners thought it best to investigate the matter and to satisfy themselves by personal inspection that the monuments had remained undisturbed in their proper places.

This was accordingly done at the outset of the season's work and it was ascertained that the stories of falsification of the marking were without any foundation of fact, that all of the monuments between the northeast corner of Tennessee and Bristol had been properly set and that none of them had been disturbed.

These preliminary operations occupied the time from June 23 to July 4, on which *your* day your commissioners returned to Bristol. After placing some additional monuments on the old line in and near Bristol, they proceeded to Gate City, Virginia, where the camp outfit had been stored at the close of work in the preceding autumn, and at once went into camp at Robinett, Tennessee, west of the North fork of Clinch River.

The survey of the boundary line was resumed at the point where it had been suspended the year before, at the crossing of Clinch River near Church's Ford.

From this point to Cumberland Gap the line crosses a succession of mountains and valleys, with comparatively little level or cleared land. Little difficulty was experienced in tracing the line in this part of its course, the marked trees

*78 being generally found at frequent intervals. The line preserved its * general course as before, except that two deflections to the northward were found which were similar to that found the year before near Bloomingdale.

The first of these occurred on the mountain called Wallen's Ridge, where

the line made a deflection of 19° to the north before reaching the summit, and kept that course for a distance of 4643.7 feet before resuming its usual direction. There were numerous trees with both the 1802 and 1859 marks on this deflected line.

The final deflection of 4° 10′ to the north for a distance of 6503.3 feet began at the "old furnace road" near Station Creek, less than three miles from the west end of the line on Cumberland Mountain. From the western end of this offset the line runs straight to the terminus.

There has been considerable controversy and litigation over these last three miles of the boundary and a number of witnesses have testified in the case of Virginia Ag't Tennessee, Supreme Court, U. S., Oct. term, 1891, that there were none of the marks of the previous surveys remaining between Station Creek and the summit of Cumberland Mountain, owing to the destruction of the timber in that area during the military operations of the Civil War.

Your commissioners were able to find, however, three trees well marked with the mark of the 1859 survey, and at least one of these bore evidence in the position of this mark that an old diamond mark was formerly visible above it.

These marked trees were found on the east and west part of the line west of the offset and are in excellent alignment, and settled beyond the possibility of doubt the location of this part of the boundary, and hence the short remaining distance to the summit of Cumberland Mountain. This line passes near and a little south of the old mill several times referred to in the case above cited, and thence across the Union Railroad station, leaving most of the town of Cumberland Gap in Tennessee. The summit of Cumberland Mountain was reached on Saturday, August 23d, 1902, and on the following Monday the field-work of the survey was completed and the camp outfit was packed and shipped to
*79 Washington. Your commissioners then * separated, Professor Buchanan returned to his home at Lebanon, Tennessee, to work up his field-notes; and Mr. Hodgkins to Washington to attend to business of the commission and to draft a report of its operation; while Mr. Baylor remained on the ground until September 13, superintending the placing of monuments along the part of the line surveyed in 1902.

In conclusion, your commissioners state that they have found the duties imposed upon them by your instructions often arduous and exacting and that the survey just completed proved far more laborious and was attended by greater hardships than any of them had anticipated, but that they have nevertheless given the same careful attention to every part of it and that they believe it to be correct throughout.

List of Monuments of Cut Limestone and Other Durable Marks, as Hereinafter More Fully Described.

(1)—At northeast corner of Tennessee, at Burnt Hill.
(2)—On summit of Flat Spring Ridge.
(3)—On Valley Creek road, on John Toliver place.
(4)—On road from Laurel River to White Top Mountain near an old mill.
(5)—On road up Laurel River, near a double ford.

On summit of Iron Mountain, near the north end of the rocky bluff, a cairn of rocks was erected.

(6)—At eastern foot Holston Mountain, a short distance from Beaver Dam Creek, and the Virginia and Carolina Railway.

Coast and Geodetic Survey triangulation station "Damascus" on summit of Holston Mountain, a stone marked $\frac{\text{U S}}{\text{C S}}$ +

(7)—On Rockhouse Branch road in the valley, on Mary Nealy place.

(8)—On road from Barron Railway station to New Shady road, cut-stone monument of 1858–'59.

(9)—In woods, north of New Shady road where the line changes its course to south 23° 50′ west (mag.) a marked deflection from the general course of the line.

*80 * (10)—On the New Shady road, where this deflected line crosses it.

(11)—In woods, on Little Mountain, west of Cox Creek, where this bearing of 23° 50′ west (mag.) ends, and the line resumes its general course to the westward.

(12)—On road just north of cross-road leading to Thomas Denton place.

(13)—On road on hill on C. D. Short place.

(14)—On road on east bank of the South fork Holston River, cut-stone monument of 1858–'59.

(15)—On hill in George Garrett's cow lot, west and north of South fork Holston River.

(16)—On road to King's mill, near John Buckly house.

(17)—On road to King's mill, via Thomas place.

(18)—On summit of open hill east of Painter place, concrete monument.

(19)—On road running east of Painter house.

(20)—On road running west of Painter house, cut-stone monument of 1858–'59.

(21)—On road through woods west of Painter property.

(22)—On summit of first high ridge east of Paperville road.

(23)—On Paperville road, at Jones place.

(24)—On road west of Carmack house.

(25)—On Booher place near first marked tree, (of 1858–'59) east of Bristol.

(26)—On north property line of the main street of Bristol outside the western wall of the cemetery. Commissioner Baylor does not consider this a part of the true line.

(27)—Outside the street wall of the Bristol cemetery, at the point where the average center line of main street intersects said wall. Commissioners Hodgkins and Buchanan do not consider this a point on the boundary.

A stone post in the edge of a field, formerly owned by Z. L. Burson, at the northwest corner of the old corporate territory of the old town of Bristol. Commissioner Baylor does not consider this a point on the boundary.

(28)—In the fork of the main road, west of the town of Bristol.

*81 * (29)—On road to Bristol, east of Worley place.

(30)—On road to Bristol, west of Worley place.

Coast and Geodetic Survey triangulation station "Dunn" on summit of ridge, on old Dunn place stone marked $\frac{\text{U S}}{\text{C S}}$ +

(31)—On Dishner Valley road.
(32)—On road to Bristol, east of Gum Spring.
(33)—On road to Bristol, near Tallman house.
(34)—On road in valley, west of old abandoned railway bed.
(35)—On Scott road.
(36)—On road west of Akard place.
(37)—On road near Jackson place.
(38)—On Boozey Creek road.
(39)—On road to Hilton ford, cut-stone monument 1858–'59.
(40)—On Timbertree road.
(41)—Between two roads just east of Gate City road.
(42)—In woods, west of Gate City road, where there is a deflection of 8° 30′ to the right, or north, from the general course of the line, on old Hickman place.
(43)—In woods northeast of Bloomingdale, where this 8° 30′ deflection from the general course of the line ends, in going westward, and line resumes its general course.
(44)—On road to Bloomingdale.
(45)—On Wall Gap road.
(46)—On road up ravine.
(47)—On Carter Valley road.
(48)—On Gate City and Kingsport road, cut-stone monument of 1858–'59.
Coast and Geodetic Survey triangulation station "Cloud" on bluff of North Holston River, stone marked $\frac{\text{U S}}{\text{C S}}$ +
(49)—On east bank of North Holston River.
(50)—On road on west bank of North Holston River.
(51)—At cross-roads on Stanley Valley road, cut-stone monument of 1858–'59.
(52)—On Stanley Valley road, on hill at turn in road.
*82 * (53)—On Cameron Post-office road.
(54)—On Stanley Valle*t*[y] road south of barn of N. J. Bussell, cut-stone monument of 1858–'59.
(55)—On Stanley Valley road, cut-stone monument of 1858–59.
(56)—On road which runs across Opossum Ridge.
(57)—On Moore's Gap road.
(58)—On Caney Valley road.
(59)—On Little Poor Valley road, south of Mary Field house.
(60)—On Poor Valley road, cut-stone monument of 1858–'59.
On summit of Clinch Mountain cairn of rocks erected, a few feet south of the Coast and Geodetic Survey triangulation station "Wildcat," which station marked with $\frac{\text{U S}}{\text{C S}}$ + cut in sandstone rock.
(61)—On Clinch Valley road.
(62)—On road on east bank of Clinch River, above Church's ford.
(63)—On road at Jane Bagley's house.

On summit of open hill east of Fisher Valley road line crosses solid rock. Small hole drilled in it, with T cut south of hole, and V north of it.

(64)—On Fisher Valley road.

On summit of high ridge, east of Robinett line crosses solid rock. Small hole drilled in it, with V cut on north side of hole, and T on south of it.

(65)—On road at Robinett.

On side of ridge at east edge of woods line crosses rock. Small hole drilled in it, with V cut on north side of hole and T on south of it.

On summit of Newman's Ridge line crosses rock similarly marked.

(66)—On Rogersville and Jonesvile road.

(67)—On Little Creek Road.

(68)—On Sneedville and Black Water Salt Works road.

(69)—On Black Water Valley road, near J. Mullen's house. Coast
*83 and Geodetic Survey triangulation station "Powell," on * summit of
U S
Powell Mountain, large sandstone rock marked +
C S

(70)—On Mulberry Gap and Wallen Creek road, near large poplar.

(71)—Near junction of Mulberry Gap and Jonesville roads.

(72)—On east face of Wallen Ridge, on edge of trail over ridge, where there is a deflection to the right, or north, of 19° from the general course of the line.

On summit of Wallen Ridge line crosses large sandstone rock. Small hole cut in it with V cut north of hole and T south of it.

(73)—On west face of Wallen Ridge, in open field, on the boundary fence of Mollie Thompson and J. W. Moore, where this deflection of 19° from the general course of the line ends, in going westward, and line resumes its general course.

(74)—On road east of Powell River, and north of Welch or Baldwin ford.

On rock bluff west of Powell River, a small hole was cut with V north of this hole and T. south of it.

(75)—On Powell River and Sneedville road, on hill west of Powell River rough stone monument with V cut on north face and T on south face.

(76)—On Powell River and Sneedville road.

(77)—On Martin Creek road.

(78)—On Low Hollow road.

(79)—On Four Mile Creek road.

(80)—On Bayles' Mill road.

(81)—On Ball's Mill road.

Coast and Geodetic Survey triangulation station "Minter," on summit of hill, near gate and fence corner.

(83)—On road south of Jacob Estep's house.

(84)—On East Machine Branch road.

(85)—On West Machine Branch road.

(86)—On Dicktown road.

(87)—On Mud Hollow Hole road, near large limestone spring.

(88)—On Hoskins' Valley road, near large limestone spring.

*84 * (89)—On George Souther's saw mill road.

(90)—On Louisville and Nashville Railway, near Brook's crossing.

(91)—On old iron-works road, where there is a deflection of 4° 10′ to the right, or north, from the general course of the line.

(92)—On Station Creek road.

(93)—On east side of Poor Valley Ridge, where this deflection of 4° 10′ from the general course of the line ends, in going westward, and line resumes its general course.

(94)—On Cumberland Gap and Virginia road, east of Cumberland Gap.

(95)—On small hill just east of road connecting Cumberland Gap with Old Virginia and Cumberland Gap road, in the edge of the old town park.

(96)—On the side of open hill facing south, about 2½ squares east of the Tazewell and Kentucky road, at Cumberland Gap.

(97)—On west side of Tazewell and Kentucky road, and just east of woolen factory at Cumberland Gap.

(98)—At foot of Cumberland Mountain, west of the Union Railway station, and in line with the south edge of the south chimney of said Union Railway station.

(99)—On summit of Cumberland Mountain. The monument of cut limestone has "V" and "T" cut on its adjacent vertical faces, and "Corner" cut on its top. Its base is set in cement and broken rock with one diagonal running east and west. The summit of the sandstone ledge was blasted in order to set this monument.

In addition to the cut-stone monuments and other durable marks, your commissioners marked with six chops, thus:—

the trees on and within ten feet of this line on each side.

*85 * Your commissioners unanimously agree in recommending that the rights of individuals having claims or titles to lands on either side of said boundary line, as ascertained, re-marked, and reëstablished by your commissioners, shall not in consequence thereof in anywise be prejudiced or affected, where said individuals have paid their taxes, in good faith, in the wrong State.

WILLIAM C. HODGKINS, [SEAL.]
Commissioner.
JAMES B. BAYLOR, [SEAL.]
Commissioner.
ANDREW H. BUCHANAN, [SEAL.]
Commissioner.

OCTOBER 13, 1902.

Report of the Treasurer of the Tennessee and Virginia Boundary Commission.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The treasurer of the commission appointed by the decree of this honorable court, dated April 30, 1900, to reëstablish the boundary between the States of Virginia and Tennessee, herewith submits the abstracts of the monthly expenditures of the entire work—ten in number—beginning May, 1901, and ending September, 1902, as follows:

No. 1. May 1901	$ 384.05
No. 2. June 1901	1083.75
No. 3. July 1901	1070.18
No. 4. August 1901	1197.76
No. 5. September 1901	1263.11
No. 6. October 1901	1565.63
No. 7. June 1902	262.13
No. 8. July 1902	1045.45
No. 9. August 1902	1245.34
No. 10. September 1902	358.59
	$9475.99
Amount chargeable to each State	4738.00

*86 * *General Summary.*

Remuneration of commissioners at $10 per day	$5730.00
Transportation to and from field	274.04
Transportation in field (about)	1085.58
Stone monuments	678.90
Labor, freight, etc.	1707.47
Total	$9475.99
Cash received from Virginia	$4737.99
Cash received from Tennessee	4738.00
Total	$9475.99

The above is respectfully submitted.

A. H. BUCHANAN,
Treasurer of the Boundary Commission.

J. C. W. United States Department of Agriculture, Bureau of Forestry, Washington, D. C.

Office of the Forester.

AUGUST 20, 1901.

This beech block came from the "offset" near its western end and just east of the "Shady road."

J. B. BAYLOR,
Commissioner.

Mr. J. B. Baylor, Tenn.-Va. boundary commission, Abingdon, Virginia.

DEAR SIR: Your letter of August 17, and also the beech block are at hand. In the absence of Mr. Sudworth, with whom your previous correspondence has been, I am glad to give you my opinion as to the questions stated in your letter.

Owing to the very slow growth of the tree, from which this block was cut, in early life, it is not possible to count the annual rings, even with the aid of a strong magnifier, with absolute certainty of accuracy. The results I have obtained show that its age in 1802 was 96 years, and that its diameter,
*87 not including * bark, was about six inches, or about 6¼ inches including the bark. There are five wounds shown in this block. Two of these occurred in my judgment, 43 years ago, or in the year 1858. The three older wounds I believe were made 99 years ago, or in 1802.

This beech block will be carefully stored away in this bureau.

Very truly, (Signed) OVERTON W. PRICE,
Acting Forester.

J. C. W. United States Department of Agriculture, Bureau of Forestry, Washington, D. C.

Division of forest investigation.

NOVEMBER 11, 1901.

This hemlock block came from near the eastern end of the "off-set line"—a short distance from where the marked trees end.

J. B. BAYLOR,
Commissioner.

Mr. J. B. Baylor, Tenn.-Va. boundary commission, Bloomingdale, Sullivan County, Tenn.

DEAR SIR: The hemlock blocks sent to this office some time ago have remained unexamined so long on account of my absence from the office. I regret to have thus delayed the answer so long.

I have just examined the specimens, and find that the deeper scar in the larger of the two specimens was made in the year 1802. Ninety-nine annual rings were formed since the scar was made. This year's growth is still in a formative stage.

The somewhat superficial scar in the smaller specimen was made in 1858, 42 annual rings having been laid on since the mark was made. The last season's growth is not complete.

As requested in your letter of Sept. 8, these blocks will be retained subject to further advices from you.

Very truly yours,

(Signed) GEORGE B. SUDWORTH, *Chief.*

*88 * *Property List Purchased for Field Outfit in the Boundary Survey.*

3 saddles, bridles and blankets	$27.50
1 cooking stove and repairs	7.00
1 heating stove	2.25
8 joints of stovepipe	1.35
1 crowbar	.65
1 shovel	.85
1 grindstone	.90
6 axes	3.90
2 files	.20
4 lamps	1.00
1 saw (large)	1.35
1 trowel	.50
2 pairs of tree-climbers	3.50
1 cot	2.50
1 office table	2.50
1 dining table	1.00
Total	$56.95

Of the above at the close of the field-work the following were sold:

2 saddles	$3.00
2 stoves	2.50
2 tables	2.00
3 lamps	.50
1 grindstone	.50
1 saw	.75
2 axes	.65
1 cot	.50
1 shovel	.60
Total	$11.00

For the remainder, not worn out, purchasers could not be found without the delay of a commissioner in the field at a greater expense than they were worth. The proceeds of the sales made—$11.00—have been returned, one half to each State.

A. H. BUCHANAN, *Treasurer.*

Decree entered accordingly.

United States v. State of Michigan.

Supreme Court of the United States, 1903.

[190 *United States*, 379.]

The effect of the legislation of Congress granting a right of way through a military reservation and 750,000 acres of public lands to be sold by the State of Michigan and the proceeds applied, under the conditions prescribed, to the construction of the St. Mary's River canal, and of the legislation of the State of Michigan in regard to the construction, maintenance and surrender of the canal to the United States, as the same are set forth in the complaint, was to create a trust, of which the State of Michigan was the trustee, to construct and maintain the canal as a work of national importance, and the State of Michigan acquired no individual beneficial interest therein. When the canal was surrendered to the United States by the State the Federal Government was entitled to whatever surplus remained in the hands of the State from the tolls collected over and above the expenses of maintenance and also to the value of the tools and materials connected with the canal at the time of the surrender.

THE United States, by leave of court, duly filed in this court its original bill in equity against the State of Michigan, to which bill the defendant has filed a demurrer substantially for want of equity, and also because it appears therefrom that the complainant has been guilty of gross laches in regard to the matters therein set forth. It will be most convenient to set forth the bill with the exception of some portions thereof which do not seem to be material, and it is as follows:

"To the Chief Justice and the Associate Justices of the Supreme Court of the United States, in equity:

"Philander C. Knox, Attorney General of the United States of
*380 America, for and in behalf of said United States, brings this * bill of complaint against the State of Michigan, and thereupon your orator complains and says:

"First.

"That the said State of Michigan, for some years previous to the date first hereinafter mentioned, was desirous of procuring the construction of a canal and lock in the Saint Marys River, at or near Saint Marys Falls, where Lake Superior empties into said river, and did at various times, by joint resolutions of the legislature thereof, importune the Congress of the United States to construct such a canal and lock on the Michigan side of said river, and was able, through the influence of its Senators and Representatives in Congress from said State, with the coöperation and influence of other States which might become directly affected in a desirable manner, to cause and procure said Congress to pass a law, which became operative on the 26th day of August, 1852, appropriating to the State of Michigan 750,000 acres of land, to be afterwards selected, to construct such ship canal and lock. Said act is in terms as follows:

"'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to said State the right of locating a canal through the public lands known as the

military reservation at the Falls at Saint Marys River in said State, and that four hundred feet of land in width, extending along the line of such canal be, and the same is hereby, granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto and the use thereof is hereby vested in said State forever for the purposes aforesaid and no other: *Provided,* That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said falls, as, under the approval of the Secretary of War, may be selected: *And provided further,* That said canal shall be at
*381 least one hundred feet wide, with a depth of water * twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide.

" 'SEC. 2. *And be it further enacted,* That there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeably to the United States surveys, by an agent or agents to be appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from any land within said State subject to private entry.

" 'SEC. 3. *And be it further enacted,* That the said lands hereby granted shall be subject to the disposal of the legislature of said State for the purposes aforesaid and no other; and the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in the public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States.

" 'SEC. 4. *And be it further enacted,* That if the said canal shall not be commenced within three and completed within ten years, the said State of Michigan shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said State remaining valid.

" 'SEC. 5. *And be it further enacted,* That the legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the construction, repairs and operating of said canal and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said State shall be fully reimbursed for all advances made for the construction, repairs and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said
*382 State shall be allowed to tax for the use of said canal * only such tolls as shall be sufficient to pay all necessary expenses for the care, charge and repairs of the same.

" 'SEC. 6. *And be it further enacted,* That before it shall be competent for said State to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall

be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

" 'Approved August 26, 1852.'

"And your orator further shows that the legislature of the State of Michigan afterwards passed an act providing for the construction of a ship canal around the Falls of Saint Mary, the same being number thirty-eight of the session laws of the State of Michigan for the year 1853. By this act the appropriation of land made by Congress as aforesaid was accepted, with all conditions therein expressed attached, and made obligatory upon the State of Michigan. By its said act, also, the governor was authorized to appoint a board of five commissioners and an engineer for the purpose of looking after the construction of said canal and lock; provisions were made relative to the contract proposed to be entered into for the construction of the canal; the expenses of surveying, locating and constructing the same; the manner in which the expenses attendant upon such construction should be paid, which was substantially out of the lands so appropriated by Congress; the keeping of accounts connected with such construction; the turning out of lands to the contractor and subcontractor, and other matters connected with such work, such act being in terms as follows:

" 'SECTION 1. *The People of the State of Michigan enact,* That the act of Congress entitled "An act granting to the State of Michigan the right of way and a donation of public land for the construction of a ship canal around the Falls of Saint Mary, in said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the State of Michigan.

" 'SEC. 2. For the purpose of carrying out the objects of said act the governor is hereby authorized, by and with the advice and consent of the senate,
*383 to appoint five commissioners and an engineer, * who shall prepare a plan for the construction of said canal in conformity with the provisions of said act of Congress and this act, to be approved by the governor, and who shall have the entire and absolute control and supervision of the construction of said canal.

* * * * * * * * * * * * * *

" 'SEC. 3. The said commissioners shall receive proposals for the construction of said canal, agreeable to said plan, and, in deciding upon said proposals, are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof.

* * * * * * * * * * * * * *

" 'SEC. 5. . . . The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the state treasury and under the direction of said commissioners. When, and as fast as the lands shall have been selected and located, and accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the state land office, whose duty it shall be to transmit to the Commissioner of the General Land

Office a true copy of said list and to designate and mark upon the books and plats in his office the said lands as Saint Mary canal lands.

"'SEC. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract; and on the completion of the same within said period to their satisfaction and acceptance and the satisfaction of the governor and engineer, they shall have a certificate thereof to be signed by the commissioners, governor and engineer, and filed in the office of the commissioner of the state land office. Thereupon it shall be the duty of the said commissioner of the state land office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for
*384 * the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the secretary of state, and patents shall immediately be issued thereon, as in other cases.

"'SEC. 7. That the said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said act of Congress, and of all expenditures in the construction of said canal, and the earnings thereof, and on or before the first Monday in October in each year return a statement thereof to the governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said act of Congress.

* * * * * * * * * * * * * *

"'SEC. 9. For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the governor shall appoint agents, in pursuance of said act. He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if, in his judgment, suitable and proper persons for that purpose.

* * * * * * * * * * * * * *

"'Approved, February 5, 1853.'

"Second.

"Your orator shows that the lands so appropriated were duly selected and certified to the State of Michigan, and that he is informed and verily believes, and so charges the fact to be, that the lands so appropriated were all sold and disposed of in some manner by the State of Michigan, and that at some time subsequent to such selection and certification said State of Michigan constructed, or caused to be constructed, and put into operation the canal and lock so appropriated for, but that the said State of Michigan did not report to the Secretary of the Interior, as required by the terms of section 5 of said act of
*385 * Congress, an accurate account of the sales and net proceeds of the lands granted and of all expenditures in the construction, repairs and operating of said canal, and of the earnings thereof; but, on the contrary, your orator shows that after diligent search and inquiry in the office of the Secretary of the Interior, to whom such annual reports should have been made, no such reports can be found on file, and no record or memorandum indicating that any report or reports, such as were provided for in said section, were ever made, so

that your orator is unable to state in what manner said lands were sold or disposed of, or whether all the proceeds thereof were in fact devoted to the construction, control and management of said canal, as in said act provided.

"Third.

"Your orator further shows that by an act of the legislature of the State of Michigan, approved February 12, 1855, a superintendent was authorized to be appointed by the governor of the State of Michigan, with the advice and consent of the senate thereof, his salary fixed, and the manner of keeping record of the vessels navigating said canal and passing through said lock, as well as the tolls to be collected and the keeping of accounts, were all provided for; that from the completion of said canal and lock the same were controlled, operated and managed by the State of Michigan, and that during the entire management of the same by said State, as your orator is informed and verily believes and therefore charges the fact to be, no funds belonging to the State of Michigan were ever permanently invested or involved in such control, operation and management, but, on the contrary, said canal was wholly constructed from the appropriation of such lands so made by the United States aforesaid, and was managed, controlled, repaired and maintained from the amounts collected as tolls from the vessels passing through said canal and lock during the several years when said State of Michigan was in such control thereof.

"Fourth.

"And your orator further shows that he is informed and verily be-
*386 lieves, and therefore charges the fact to be, that during * such management and control by the State of Michigan there were from time to time moneys collected in the form of tolls in excess of the amounts actually used at the period of such collection, and that this was done without intention on the part of the State of Michigan to make a profit from the management and control of said canal in violation of the act of Congress hereinbefore quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed to navigation or any time when so needed, and that said fund gradually increased in amount with the increasing volume of commerce through the canal until finally, at the time when the canal was turned over to the United States, there was in the treasury of the State of Michigan belonging to the fund of said canal, not appropriated or the expenditures thereof in any way provided for, the acknowledged sum of $68,927.12, all of which had been paid for or collected in the manner hereinbefore stated for the purposes hereinbefore mentioned, and in direct compliance with the requirements of the act of Congress originally providing for the construction of said canal; and that said money had been collected in good faith and for the purposes of devoting the same ultimately to the repair, improvement, supervision and expenses of the management thereof.

"And your orator further shows that there was purchased and collected from time to time a large quantity of tools, implements and property of various kinds in connection with extensions, repairs, improvements, management and control of said canal and lock by defendant, and at the time of the transfer to the

United States as aforesaid the same were on hand and within the control and in the custody of the defendant, all of which properly belonged and appertained to the said canal and lock and to the defendant in its capacity as the manager and controller thereof, but whether any further and larger sum of money than is hereinbefore stated was, should or might have been on hand and within the control of said defendant, in its treasury or otherwise, or might or should have been accredited to the account of the said canal and lock, your orator does
*387 not know and has no means of being informed, and is therefore * obliged to depend upon an accounting by the defendant, hereinafter to be prayed for, for correct and authentic information.

"Fifth.

"And your orator further shows that the State of Michigan had no beneficial interest in said canal or lock, except as it affected the general public welfare, and had expended, or claimed to have expended, all the appropriation of Congress for the construction of the same, and that the increasing demands of commerce required great expenditures of money for the enlargement and betterment of said canal and lock, together with the probable construction of a new and enlarged lock, and that it was not convenient, if possible, to provide the funds therefor by the collection of tolls upon the vessels passing and repassing through said canal; that the State of Michigan not alone being interested in such enlargement and improvement, but rather the general public, and particularly the inhabitants of several rapidly growing States of the Union, it was proposed to transfer the canal to the United States to accomplish such end, and for that purpose an act was passed by the legislature of the State of Michigan and became operative on March 3, 1881."

(This act, although not set forth in the bill, is given in the margin.)[1]

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[1] Act No. 17, Public Acts 1881.

An act to authorize the board of control to transfer the Saint Mary's Falls Ship Canal, with property belonging to the same, to the United States.

Whereas, Congress at its last session included in the river and harbor bill the following: For improving and operating the Saint Mary's River and Saint Mary's Falls Canal, two hundred and fifty thousand dollars. "And the Secretary of War is hereby authorized to accept on behalf of the United States from the State of Michigan the Saint Mary's Canal and the public works thereon: *Provided,* Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use: *And provided further,* That after such transfer the Secretary of War be and hereby is authorized to draw from time to time his warrant on the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair;" therefore,

SEC. 1. *The People of the State of Michigan enact,* That the board of control of the Saint Mary's Falls Ship Canal be and hereby is authorized and directed to transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States, in accordance with (the) provisions of the above mentioned clause: *Provided,* That this cession is upon the express condition that the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Mary's Falls Ship Canal, and in and over all lands acquired or hereafter acquired for its use; that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Mary's Falls Ship Canal, its lands, and in the buildings that may be erected thereon, in the same

*388 * "By the terms of said act the board of control of said canal, constituted by defendant for its management, was authorized and empowered, at any time when they might deem it proper, to transfer all material belonging to said canal and to pay over to the United States all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance in accordance with the act transferring the same to the United States; and the Congress of the United States in turn passed an act authorizing the Secretary of War to accept on behalf of the United States from the State of Michigan the said canal and the public works thereon, and appropriating $250,000 to improve and operate the same, the same being the act approved June 14, 1880, found in 21 Stat. 189." (This act is correctly set forth in the preamble to the foregoing act of the State of Michigan.)

*389 * "And thereupon said canal actually was transferred to the officers of the Government of the United States connected with the War Department thereof, and your orator shows, avers and charges that no tools, implements, personal property, chattels, goods, moneys, or effects of any name or nature that were in the treasury of the State of Michigan, or should or might have been therein at the time of such transfer, or within the custody of said State of Michigan, defendant herein, or might have been in such custody connected with or belonging to said canal or lock, its funds, its management and control, were so transferred and turned over.

"Sixth.

"Your orator further shows that, while certain of the terms of the act of Congress appropriating the land for the construction of said lock and canal indicated a donation to the State of Michigan for such purpose, it was really the intent and purpose of the Congress of the United States to appropriate such lands, not for the purposes of exclusively enriching the State of Michigan, increasing its commerce or extending its authority alone, but for the purpose of accomplishing a public work for the general good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States, and for that reason, while granting said lands to the State of Michigan in certain of its terms, it was provided that in case of the failure to construct said canal the proceeds of the sale of such lands should be returned to the United States; also that the State of Michigan should have no beneficial interest in the revenue from said canal, when constructed, while in its management and control, but that the said canal and lock should be actually free to the United States Government, and for the use of all persons desiring the same, except as to the necessary tolls to pay for their supervision, repairs and maintenance; and it was also provided that a strict account should be kept of the sales of said lands, and that they should be

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way and manner as if jurisdiction had not been ceded as aforesaid.

SEC. 2. The board of control of the Saint Mary's Falls Ship Canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: *Provided,* Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Mary's Falls Ship Canal for the use of disabled vessels.

This act is ordered to take immediate effect.

Approved March 3, 1881.

applied to the construction of said canal and lock and to no other purpose whatever; also that annual reports should be made by the State of Michigan
*390 and forwarded by the governor thereof to the Secretary * of the Interior concerning the management, control and sale of lands; and thus, instead of being an actual grant or donation of lands to the State of Michigan for its individual benefit, and to become a part of its domain and to be within its ownership, the terms of said act merely operated to create a trust in the State of Michigan for the purpose of carrying out a public work in which it, the State of Michigan, had become interested for the general public good. Your orator further shows that by the act of the legislature of the State of Michigan hereinbefore quoted said donation or appropriation of lands was accepted subject to all limitations, restrictions and conditions imposed by Congress as aforesaid. Your orator further shows that the State of Michigan, at the time and continuously until a very recent period, hereinafter to be mentioned and set forth, not only regarded its sale of said lands, its construction of said works and its management and control of the latter as a trust for the public good from the complainant, but also through its legislature, as well as various of its officers, so declared; and that in an act of the legislature of the State of Michigan passed and approved February 14, 1859, the same being No. 175 of the session laws of the State of Michigan for said year, and particularly in the third paragraph of the preamble thereof, said legislature made use of the following language:

"'Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress, and the assent of this State thereto,' etc.

"And your orator further shows that the treasurer of the State of Michigan, who, by virtue of his office, was one of the members of the said board of control of the Saint Marys Falls Ship Canal, in his annual report for the year 1883, duly made to the governor and transmitted to the legislature of said State, made use of the following language:

"'Since my last report, the remainder of the personal property belonging to the Saint Marys Falls Ship Canal has been sold, making a final balance
*391 in that fund of $68,927.12. All * business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the state treasury, under act No. 17, laws 1881, the State acting simply as trustee.'

"But your orator shows that of late said defendant, through its officers and servants, and particularly its attorney general and the board of control of St. Marys Falls Ship Canal, denies such a trust, or its liability to the United States in the premises.

"Seventh.

"Your orator further shows and charges that it became and was the duty of the State of Michigan to transfer and pay over to the United States all funds appertaining to or connected with or collected for the repairs and management of said canal to the complainant, and to transfer to the complainant all property of every name and nature within its custody and control in connection with said canal and lock, and that instead of so performing its equitable duty in the premises, the said State of Michigan, the defendant herein, converted said funds to its

own use, by passing a joint resolution transferring the same from the canal fund to the general fund in the treasury of said State, said joint resolution being No. 20, of the public acts of 1897, which in terms is as follows:

" 'Whereas there has remained to the credit of the St. Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any person who paid the same into the fund or by the General Government;

" 'And whereas there now remains on hand, under the board of control of the St. Marys Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

" '*Therefore, resolved by the Senate and House of Representatives of the State of Michigan,* That the auditor general be, and he is hereby, directed
*392 to transfer such balance as shown upon * the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

" '*And be it further resolved,* That the board of control of the St. Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State.'

"Your orator further shows that a due and proper request to account to the United States in the premises, and to pay over all funds and turn over all property in its hands to the United States, has been made by your orator of the governor of the State of Michigan and all of the officers of said State directly concerned in any manner with the custody, management or control of said fund or property, and particularly of the board of control of the St. Marys Ship Canal, which consists of the governor, auditor general and treasurer of the said State of Michigan, and also of the attorney general of the State of Michigan, and that said reasonable and just request has been refused by them and each of them."

The bill prayed for an accounting as to the sales of the lands, the prices obtained therefor, the application of the proceeds of the sales or exchange of such lands to the cost of the construction of the canal, the tolls received, their application, and also an accounting as to the tools on hand at the time of the transfer of the canal to the United States.

Mr. Horace M. Oren, attorney general of the State of Michigan, for defendant.

There was no trust relation between the United States and the State of Michigan, but the State, by the act of 1852, took an absolute, unconditional and indefeasible title upon its acceptance of the grant and the completion of the canal, and by right of such ownership belongs to it any incidental pecuniary benefits of earnings that may have arisen from its operation of the canal.

*393 *First:* The words of grant found in the act are such as are * commonly employed to vest a fee title and a beneficial interest in the grantee.

Second: The limitations upon the use of the canal imposed by the act in question cannot be considered as conditions subsequent intended to operate in possible impairment of an otherwise indefeasible title, but as covenants of the

grantee enforceable only through actions in that behalf and not by forfeiture or defeasance of the estate granted.

Third: The acts of both the United States and the State as expressed in legislation negative the idea that the State's title to the canal was not absolute and indefeasible, and that the United States had an usufructory interest in the tolls or other earnings thereof.

Admitting the allegations in complainant's bill, it does not appear that the conditions relative to the use and operation of the canal imposed by the act of August 26, 1852, were violated by the State. No breach of the conditions upon which a money demand could be predicated is claimed in complainant's bill except that the State made a profit out of the operation of the canal. A surplus of tolls was on hand to meet possible emergencies, but this is not to be held as a violation of the limitation upon the amount of tolls that could be collected. A certain portion of the earnings of the canal was not subject to the conditions which related to the rates of toll that could be charged. The United States, by subsequently taking over and accepting the canal from the State, particularly in the light of the several acts of offer and acceptance, must be held to have waived any claims for a breach of the condition imposed by the original grant.

Conceding *arguendo,* that upon acceptance of the grant the State became a mere trustee and not seized of an estate implying the vesting of a beneficial interest in the grantee, the United States was not named or intended as *cestui que trust.*

But whether *cestui que trust,* or having any interest in the execution of the trust that would entitle it to apply to a court of chancery to compel its proper enforcement, the United States acknowledged the due execution of the trust and discharged the trustee by its taking over of the canal and by
*394 the * declarations contained in the act of Congress in reference thereto.

The declarations of the legislature and officers of the State of Michigan did not create a trust, and certainly not one in which the United States would have a beneficial interest as *cestui que trust.*

If Congress, on the termination of the so-called governmental agency or mixed trust and power, could have made a claim of right to have the surplus tolls accumulated by the State in carrying out such agency turned over to itself, yet nothing short of a declaratory act to that effect would create the right on the part of the Department of Justice to make this demand upon the State.

The acts of Congress and the acts of the legislature of Michigan relating to the taking over of the canal by the United States operated as a settlement of all accounts between the United States and the State, rendering an accounting unnecessary.

Mr. Marsden C. Burch for the United States.

Laches have been set up as a ground of demurrer, but as no consideration has been given to that ground in the brief or in oral argument, that question might well be considered eliminated. The only remaining question is whether the State constructed the canal and operated it upon a trust for the United States. It was a mixed trust and power. The original granting act had a two-fold purpose. First, the granting of an easement or right of way through the public domain for the purpose of constructing the canal. Second, the appropriation of lands and the disposal of the same, the construction of the canal and its operation and maintenance. While it is true the term "granted" was used in the act, it will be observed that the property granted was "for the aforesaid purposes and no other." These words of express limitation serve to show that it was not the intention of the Government to invest the State with unqualified ownership

in the canal, but simply with the management and control of the same. The word "grant" is not a technical word like "enfeoff," and the State took
*395 but a naked * trust in the thing granted. *Rice* v. *Railroad Company,* 1 Black, 378, construing an act of Congress granting lands to a Territory for the purpose of aiding in the construction of a railroad.

The intention of Congress that the whole enterprise was merely a trust is evident from the fact that due care was taken to provide in the act for an annual accounting and reports by the State to the Secretary of the Interior. These reports and accounts have never been rendered, and thus it becomes necessary to invoke this court in aid thereof. The Government is entitled to an accounting for all the lands sold, the prices received for them, the amount of tolls earned and collected, and the amount of money expended on behalf of the canal. It is also entitled to any moneys on hand at the time the canal was turned over, as well as all tools, implements, machinery, etc., or their equivalent in money.

The act of the legislature of Michigan accepting the grant subject to all the conditions expressed in the act of Congress completed the trust relation. Subsequently, the State, in passing other legislation regarded it as a trust and so characterized it from time to time. The report of the state treasurer also regarded it in this light in reporting the amount of money on hand in the canal fund after the canal had been turned back to the United States.

The money had never been paid over by the State. By a joint resolution of its legislature, the amount was converted to the use of the State and covered into its general fund.

The State took the lands for the purpose of constructing the canal upon certain conditions and limitations, obligating itself to render accounts and reports of all its doings in the premises. The acts of Congress and the acts of the legislature taken together clearly indicate that a trust was created and the United States now seeks an accounting by the trustee.

The bill is well founded in law and the demurrer should be overruled.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court.

*396 * By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although it is not literally between two States, the United States being a party on the one side and a State on the other. This was decided in *United States* v. *Texas,* 143 U. S. 621, 642.

In the consideration of this case, the controlling thought must of course be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but in view of the character of the subject, the language should have its ordinary and usual meaning.

Whether, under these circumstances, technical words were used to express the thought that the State was to be a trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. *Winona &c. R. R. Co.* v. *Barney,* 113 U. S. 618, 625.

The general purpose of these statutes was to build a ship canal, by means of the funds procured from the sale or other disposition of the public lands of the United States, to be used by all those whose business or pleasure should call them to pass through it in order to reach their destination.

As is well known, the Saint Marys River connects the waters of the lakes, Huron and Superior. The navigation of the river is interrupted by Saint Marys Falls, and it early became necessary, in order to provide conveniences for a rapidly increasing commerce, that there should be built a ship canal around these falls, so that large vessels coming from or going to Lake Superior should be thereby enabled to pursue their voyage to the east or to the west without interruption by those falls. The State of Michigan did not feel at that time (1850–1852) able to undertake such work herself, although it was a matter of much importance to many of her citizens. Finally the United States passed the act of 1852, set out in
*397 full in the foregoing statement. * The State subsequently accepted the same with all the conditions contained therein. We think it sufficiently appears from a perusal of these two acts that it was assumed that the grant of the right of way through the lands of the United States and the grant of the 750,000 acres of its public lands in the State of Michigan would pay the cost of construction of the canal, and the tolls to be collected by the State would repay it for all advances made by it in the repairs which would naturally and from time to time be required in such a work. There was no reason why the United States should provide that the State of Michigan should actually receive a profit over and above the payment to it of all its expenses for the construction of the canal and for keeping it in repair. If, through the action of the United States, a public work of national importance were constructed within the boundaries of that State, and the State itself reimbursed for every item expended by it in the construction and in the keeping of such work in repair, it would certainly seem as if the State could properly ask no more. It was clearly not the intention that the State should realize a beneficial interest from the transaction between the United States and the State over and beyond that which would arise from the existence of this canal. The cost of its construction and the keeping of it in repair were not to be borne by the State, even to the extent of a single dollar. That the parties supposed the cost would be borne by the United States is proved by an examination of the statutes, and if it be a fact, it goes far to show that the State was in this matter acting in effect and substance as an agent, or, in other words, as a trustee for the United States, and that the transaction was not to be a source of profit to the State, by reason of getting more from the United States than it would cost to build the canal.

The expectation that the means provided by the United States for the construction of the work would be adequate for that purpose, was not a visionary one, and it is proved by the fact, alleged in the bill and admitted by the demurrer, that such means were in truth adequate, and the canal was wholly constructed from the appropriation of the lands granted by the United States, and
*398 managed, repaired and maintained from * the tolls exacted by the State from vessels passing through the canal.

An examination of the act of Congress of 1852, set forth in the foregoing statement of facts, will show, as we think, the trust character of the transaction between the United States and the State. There is granted to the State, by sec-

tion one, the right of locating a canal through the public lands of the United States four hundred feet in width, but this right of way is by the terms of the act to be used by the State or under its authority for the construction or convenience of such canal and the appurtenances thereto, and the use thereof is thereby vested in the State forever, but "for the purposes aforesaid and no other." The canal must be at least one hundred feet wide, with a depth of water of twelve feet, and with locks at least two hundred and fifty feet long and sixty feet wide. The act does not grant an absolute estate in fee simple in the land covered by this right of way. It was in effect a grant upon condition for a special purpose; that is, in trust for use for the purposes of a canal, and for no other. The State had no power to alien it and none to put it to any other use or purpose. Such a grant creates a trust at least by implication. We have just held in *Northern Pacific Company* v. *Townsend, ante* p. 267, in reference to a grant of a right of way for the railroad, that it was "in effect a grant of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

The second section granted to the State, "for the purpose of aiding such State in constructing and completing said canal, 750,000 acres of public lands," belonging to the United States and lying within the State, which were to be subject to the disposal of the legislature of the State for such purpose and no other, and the canal was to be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States. It was also provided that if the canal should not be commenced within three
*399 years and completed within ten years, the State * was bound to pay to the United States the amount it received upon the sale of any part of said lands by the State at not less than $1.25 per acre, although the title to the purchasers from the State should remain valid. The State was bound to cause to be kept accurate accounts of sales and net proceeds of the lands granted and of all expenditures in the construction, repair and operating of the canal and of the earnings thereof, and was to render a statement of the same annually to the Secretary of the Interior, and whenever the State should be fully reimbursed for all advances made for the construction, repairs and operation of the canal, with legal interest on all advances until the reimbursement of the same, or upon payment by the United States of any balance of such advances from the receipts from the lands and canal with such interest, the State was then only to be allowed to tax for the use of the canal such tolls as should be sufficient to pay all necessary expenses for the care, charge and repairs of the same, and before the State could dispose of any of the lands, the route of the canal was to be established and a plat thereof filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office. The sixth paragraph of the bill calls special attention to these facts.

In this Federal statute we find the purpose of the United States in granting the land. It was not for the benefit of the State of Michigan, and the State did not thereby receive any beneficial interest in such lands. As soon as it was repaid its outlay for the cost of the construction and for the maintenance and repairs of the canal, the tolls were to be reduced to such a sum as should be suffi-

cient only to pay the necessary expenses for the care, charge and repair of the same. Evidently it was not supposed that the State was to profit from this grant further than such profit as might arise indirectly from the completion and operation of the canal.

Defendant refers to certain grants of land made to Illinois, Indiana and Ohio, and perhaps to some of the other States, where such grants were made to aid in the construction of canals in those States, and where possible profits from the construction of such canals were within the contemplation of the
*400 various grants. * But in the acts referred to there are no restrictions upon the tolls which the States may charge for the use of their respective canals, the only limitation imposed being that the Government should have their free use for the passing of its vessels, while in this act the tolls which the State may charge are to be only such, after the payment for its construction, etc., as should be sufficient to pay the necessary expenses for the care, charge and repairs thereof.

The State of Michigan, through an act of its legislature, duly accepted the terms of the act of Congress, and agreed to carry out all the conditions therein made obligatory upon that State. An attentive reading of that statute shows its purpose to conform to all of the provisions of the Federal statute. It provides (section 7) for keeping accurate books of account of sales and net proceeds of the lands and for making returns to the Secretary of the Interior containing such accounts; provides (section 5) for designating the lands granted as "Saint Mary Canal Lands;" and also (section 3) provides that in letting contracts for construction of the canal, the responsibility of the proposed contractor and his ability to carry into effect the object of the act of Congress are to be considered. Reading both statutes, it seems to us the effect was to create a trust, and that the State was made the trustee to carry out the purposes of the act of Congress in the construction and maintenance of the canal. If there were funds arising from the sale of the lands over and above the cost of construction and other expenses of the canal, it could not within reason (after a perusal of these two statutes, with the provisions for accounting for sales and net proceeds of lands, and the other provisions of the statutes already mentioned) be supposed the parties understood that Michigan was to have for its own treasury the balance arising beyond such cost, maintenance, etc., of the canal. If a surplus arose in the course of the operation of the canal the tolls were to be at once reduced, and it seems to us that that surplus would upon a fair and reasonable construction of the acts belong to the original owner of the lands, by means of which the State, as in substance the agent of the United States, was enabled to construct the canal and secure the tolls arising from its operation, to be expended
*401 upon its maintenance * and for necessary repairs. This would certainly be so after the formal transfer of the canal and after the surplus was conclusively ascertained, and was subject to no further claims for repairs of the canal on the part of the State. The tolls were in fact the proceeds of the trust fund (the lands) which belonged to the United States, and should be transferred with the rest of the trust property.

Where Congress grants land to a State to be used as provided in this statute, we think a trust or power to dispose of the lands for the purpose of carrying out the improvement is granted, and in this case no beneficial interest

passes to the State by the language used, considering the whole statute. *Rice* v. *Railroad Company,* 1 Black, 358, 378.

If any particular part of the statute in this case were ambiguous or its meaning doubtful, of course the intention must be deduced from the whole statute and every part of it. Hence the importance of those provisions which in effect, if carried out, prevent the State from making any direct profit by the construction of the canal or from the tolls received from vessels passing through it. And where words are ambiguous, legislative grants must be interpreted most strongly against the grantee and for the Government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public. *Rice* v. *Railroad Company, supra,* p. 380. This rule of construction obtains in grants from the United States to States or corporations in aid of the construction of public works. 1 Black, 381.

Then, too, there is the almost contemporaneous construction placed upon the Federal statute by the legislature of Michigan in the act No. 175, approved February 14, 1859, in the preamble of which it is said that "whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress and the assent of this State thereto," etc. Again, the treasurer of the State, who by virtue of his office was one of the members of the board of control of the Saint Marys Falls Ship
*402 * Canal, in the course of his annual report for the year 1883, made to the governor and transmitted to the legislature of the State, used the following language:

"Since my last report, the remainder of the personal property belonging to the Saint Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the state treasury under act No. 17, laws of 1881, the State acting simply as trustee."

We do not, of course, assume that the state treasurer could bind the State of Michigan by any admission he might make in a report to the legislature of that State, but it shows simply the understanding of that official, who was so closely connected with the construction and operation of the canal, in relation to the surplus funds in the treasury of the State arising out of the operation of the canal. That the state legislature in 1859 regarded the State as a trustee, is evident from the above language in the portion of the preamble quoted.

Finally, by the joint resolution of the legislature, being No. 20 of the Public Acts of 1897, it was stated as follows:

"Whereas there has remained to the credit of the Saint Mary's Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any persons who paid the same into said fund or by the General Government.

"And whereas, there now remains on hand, under the control of the board of control of the Saint Mary's Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery; therefore

"*Resolved by the Senate and House of Representatives of the State of Michigan,* That the auditor general be and he is hereby directed to transfer such balance as shown upon the books of his office to and the same shall hereafter become a part of the general fund of the State.

*403 "*And be it further resolved,* That the board of control of the * Saint Mary's Ship Canal be and they are hereby authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State."

From these statutes and resolutions we think it quite clearly appears that the State and its public officers thought that a trust had been created, and that the State had received the lands in trust for the purpose of carrying out the provisions of the Federal statute. A surplus arising from the sales of lands and from the tolls, over and above all cost of construction, repairs, etc., after the formal transfer of the canal itself, belongs to the United States, and it is the proper party to recover the same.

The counsel for defendant, however, urged that other action by the United States shows that no such trust existed. He referred to the joint resolution of the State adopted in 1869, wherein the necessity for the immediate enlargement of the Saint Marys Falls Canal, a work of urgent necessity and national importance, was advocated, and it was therein said that the State of Michigan had no funds properly applicable to such purpose, and it was, therefore, resolved that the board of control of the canal should be authorized and directed to transfer the canal, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States, provided the State should be first guaranteed and secured to the satisfaction of the board against loss, by reason of its liability, on certain bonds which had been issued by it under authority of an act to provide for the repairs upon the canal, "and to perform the trust respecting the same," approved February 14, 1859. Even in this act of 1859, the legislature, as has already been stated, acknowledges the trust and passes an act for the purpose of performing its obligations respecting the same. But it is said that this resolution (of 1869) providing for the transfer of the canal was not noticed or accepted by the United States until 1880, when Congress, by an act approved June 14, 1880, authorized the Secretary of War to accept on

*404 behalf of the United States from the State of Michigan the * canal, provided "such transfer should be made so as to leave the United States free from any and all debts, claims and liability of any character whatever. Said canal after such transfer to be free for public use."

This offer under the act of 1880 was accepted by the State by act No. 17, Public Acts of Michigan of 1881, *supra,* and the board of control was authorized and directed: First. "To transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States," in accordance with the provisions of the act of Congress approved June 14, 1880; and, second, "At any time when they may deem it proper, *to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund,* excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: *Provided, Such transfer of material and*

payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Mary's Falls Ship Canal for the use of disabled vessels."

It is argued from this legislation that Congress thereby recognized and acknowledged the ownership of the canal by the State free from any trust connected therewith, and that the provision by the State for transferring all material belonging to the canal and for paying over to the United States all moneys remaining in the canal fund, etc., were upon the condition just quoted, and it is stated that there was no proof that such dry dock had been constructed, and hence there was no liability on the part of the State to pay the moneys or deliver the tools. But if the original transaction amounted to a trust, as we think it did, the attempt of the State to impose a condition upon its payment of the moneys and the transfer of the tools did not take away its liability as trustee nor make it necessary that the United States should build the dry dock before it should be entitled to the money and the tools. The United States might have been satisfied to permit the State to retain its nominal title and to remain in possession, and to operate the canal under its original obligations, and
*405 when in 1880 it authorized the Secretary * of War to accept the canal from the State without any liability on its part for debts or claims in regard to the canal, it did not thereby in any manner admit the non-existence of any trust theretofore created. Assuming that the land grant and the tolls had been sufficient to construct the canal and operate and repair it, there was no reason why the United States should assume or agree to pay any debts or claims which might exist in regard to the canal. The consideration for the transfer of the material and the payment of the moneys amounted at most to a provision in the nature somewhat of condition subsequent, and the right to such transfer and payment did not rest upon the prior building of the dry dock by the United States. There was nothing in this legislation, in our opinion, which changed the character in which the State had acted as trustee up to the time of such transfer of the canal, and the liability of the State was not altered by reason of the act of 1880 or that of 1881.

We are of opinion that the bill shows a cause of action against the State of Michigan as trustee, and its liability to pay over the surplus moneys, (if any,) which upon an accounting it may appear have arisen from the sale of the granted lands, over and above all cost of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus money arising from the tolls collected, which latter sum by the demurrer is admitted to amount to $68,927.12. This sum the United States in substance (especially in the fourth paragraph of the bill) admits is all that is due from the State on account of such tolls. It is not entitled to go back of that amount and call for an accounting as to the tolls prior to the transfer of the canal to the United States. The latter is also entitled to recover the value of the tools, etc., mentioned in the bill, as of the time of the transfer of the canal.

We think there is no ground of defence arising from any alleged laches on the part of the United States in bringing this suit. Assuming the existence of what would be laches in a private person, the defence that might arise therefrom is not available ordinarily against the Government. *United States* v. *Beebe,* 180 U. S. 343, 353.

*406 * There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defence to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon.

Demurrer overruled and leave to answer given, etc.

State of South Dakota v. State of North Carolina.

Supreme Court of the United States, 1904.

[192 *United States,* 286.]

This court has jurisdiction over an action brought by one State against another to enforce a property right, and where one State owns absolutely bonds of another State, which are specifically secured by shares of stock belonging to the debtor State this court can enter a decree adjudging the amount due and for foreclosure and sale of the security in case of non-payment, leaving the question of judgment over for any deficiency to be determined when it arises.

The motive of a gift does not affect its validity, nor is the jurisdiction of this court affected by the fact that the bonds were originally owned by an individual who donated them to the complainant State.

Where a statute provides that a State issue bonds at not less than par to pay for a subscription to stock of a railroad company; and, after advertising for bids in accordance with the statute and receiving none, the bonds are delivered to the railroad company
*287 in payment of the subscription, the * transaction is equivalent to a cash sale to the company at par, and the State becomes the owner of the stock even though no formal certificates therefor are issued to it.

Under the special provisions of the statute involved the endorsement on bonds that each bond for $1,000 is secured by an equal amount of the par value of the stock subscribed for by the State, is tantamount to a separation and identification of the number of shares mentioned and constitutes a separate and registered mortgage on that number of shares for each bond.

A holder of a certain number of such bonds may foreclose on the specific number of shares securing his bonds and the holders of other bonds and of liens on the property of the railroad company are not necessary parties to the foreclosure suit.

By an act passed in 1849, chap. 82, Laws, 1848–49, the North Carolina Railroad Railroad Company was chartered by the State of North Carolina with a capital of $3,000,000 divided into 30,000 shares of $100 each. The State subscribed for 20,000 shares. The statute authorized the borrowing of money to pay the state subscription and pledged as security therefor the stock of the railroad company held by the State. In 1855 a further subscription of 10,000 shares was authorized by statute, chap. 32, Laws, 1854–55, to be issued on the same terms and with the same security. At the same session an act was passed incorporating the Western North Carolina Railroad Company, chap. 228, Laws, 1854–55,

which authorized a subscription by the State and the issue of bonds secured by the stock held by the State in said company. On December 19, 1866, a further act was passed, chap. 106, Laws, 1866–67, entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes," which, after referring to the prior acts of the State authorizing the issue of bonds and stating that a portion of them had already been issued, added:

"And, whereas, it is manifestly the interest of the people of the whole State, that the residue of the bonds, when issued, shall command a high price in market; therefore,

"SEC. 1. *Be it enacted by the General Assembly of the State of North* *288 *Carolina, and it is hereby enacted by the authority of the * same,* That the public treasurer be, and he is hereby, authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854-55 and 1860-61, to issue bonds of the State to the amount of fifty thousand dollars or more to mortgage an equal amount of the stock which the State now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond, a deed of mortgage for an equal amount of stock to said North Carolina Railroad, said mortgage to be signed by the Treasurer and countersigned by the Comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the said charter of the said North Carolina Railroad Company; and, further, that such mortgages shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

Under this last act bonds were issued in the sum of $1,000 each, having this endorsement:

"State of North Carolina, Treasury Department,

RALEIGH, July 1, 1867.

"Under the provisions of an act of the general assembly of North Carolina entitled 'An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad Company, and for other purposes,' ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

"Witness the signature of the public treasurer and seal of office, and the counter-signature of the comptroller.

"KEMP P. BATTLE,
Public Treasurer."

"S. W. BURGIN, *Comptroller.*

These bonds ran thirty years and became due in 1897. In 1879 the State of North Carolina appointed commissioners to adjust and compromise the *289 state debt, and all of the last mentioned * bonds have been compromised with the exception of about $250,000. Simon Schafer and Samuel M. Schafer, either individually or as partners, owned a large proportion of these outstanding bonds, having held them for about thirty years. In 1901 Simon Shafer gave ten of these bonds to the State of South Dakota. The letter accompanying the gift was in these words:

"Office of Schafer Brothers, No. 35 Wall Street,
NEW YORK, September 10th, 1901.

"Hon. Charles H. Burke.

"Dear Sir: The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second-mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

"The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

"The bonds are all now about due, besides, of course, the coupons, which amount to some one hundred and seventy per cent of the face of the bond.

"The holders of these bonds have been advised that they cannot maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

"The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.

"These bonds can be used to great advantage by States or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

"If your State should succeed in collecting these bonds it would be the inclination of the owners of a majority of the total issue now outstanding
*290 to make additional donations to such * governments as may be able to collect from the repudiating State, rather than accept the small pittance offered in settlement.

"The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.

"Very respectfully,

"SIMON SCHAFER."

Prior thereto, and on March 11, 1901, the State of South Dakota had passed the following act, Session Laws, South Dakota, chap. 134, p. 227:

"An act to require the acceptance and collections of grants, devises, bequests, donations, and assignments to the State of South Dakota.

"Be it enacted by the Legislature of the State of South Dakota:

"SEC. 1. That whenever any grant, devise, bequest, donation or gift or assignment of money, bonds or choses in action, or of any property, real or personal, shall be made to this State, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this State; and all such bonds, notes or choses in action, or the proceeds thereof when collected, and all other property or thing of value, so received by the State as aforesaid shall be reported by the governor to the legislature, to the end that the same may be covered into the public treasury or appropriated to the State University or to the public schools, or to state charities, as may hereafter be directed by law.

"SEC. 2. Whenever it shall be necessary to protect or assert the right or title of the State to any property so received or derived as aforesaid, or to collect or reduce into possession any bond, note, bill or chose in action, the attorney general

is directed to take the necessary and proper proceedings and to bring suit in the name of the State in any court of competent jurisdiction, state or Federal,
*291 and to prosecute all such suits, and is authorized * to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation out of the recoveries and collections in such suits and actions."

This act was passed on the suggestion that perhaps a donation of bonds of Southern States would be made to the State. On November 18, 1901, the State of South Dakota, leave having been first obtained, filed in this court its bill of complaint, making defendants the State of North Carolina, Simon Rothschilds (alleged to be one of the holders and owners of the bonds originally issued by the State and secured by a pledge of the stock in the North Carolina Railroad Company under the acts of 1849 and 1855) and Charles Salter (alleged to be one of the holders of the bonds issued under the act of 1855 and 1866 on account of the subscription to the Western North Carolina Railroad Company), the two individuals being made defendants as representatives of the classes of bondholders to which they severally belong. In it the plaintiff, after setting forth the facts in reference to the several issues of bonds and its acquisition of title to ten, prayed that an account might be taken of all the bonds issued by virtue of these statutes; that North Carolina be required to pay the amount found due on the bonds held by the plaintiff, and that in default of payment North Carolina and all persons claiming under said State might be barred and foreclosed of all equity and right of redemption in and to the thirty thousand shares of stock held by the State, and that these shares or as many thereof as might be necessary to pay off and discharge the entire mortgage indebtedness, be sold and the proceeds after payment of costs be applied in satisfaction of the bonds and coupons secured by such mortgages; and also for a receiver and an injunction.

Defendant Rothschilds made no answer. On April 2, 1902, the State of North Carolina and the defendant, Charles Salter, filed separate answers. North Carolina in its answer denied both the jurisdiction of this court and the title of the plaintiff; averred that the bonds were not issued in conformity with
*292 the * statute; admitted the ownership of thirty thousand shares of stock; denied that the mortgages were properly executed or that they had the effect of conveyances or transfers either in law or equity of said stock, or conferred any lien by way of pledge or otherwise upon the same; denied that she ever had any compact or agreement whatever other than that contained in the Constitution of the United States with South Dakota, or that South Dakota had ever informed North Carolina of any claim against her, or made any demand in respect to it, or any effort to settle or accommodate. Salter's answer was mainly an admission of the allegations of the bill with a claim that all the stock should be sold in satisfaction of the mortgage bonds of which he was charged to be the representative. Testimony was taken under direction of the court before commissioners agreed upon by the parties.

Mr. Wheeler H. Peckham, with whom *Mr. R. W. Stewart* was on the brief, for complainant:

This court has jurisdiction as the suit comes within the precise terms of Art. III of the Constitution. Where the language used in a constitution or statute is plain, clear and free from ambiguity there is no room or occasion for inter-

pretation, and the language must be construed according to its plain meaning and intent. One citation is sufficient—*Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1. *"Quoties in verbis nulla est ambiquitas ibi nulla expositio contra verba fienda est." Everard* v. *Poppleton,* 5 Q. B. 183; *Gadsby* v. *Barry,* 8 Scott, N. R. 804. The decision in *Chisholm* v. *Georgia,* 2 Dall. 419, that the suit would lie was the occasion for the Eleventh Amendment to the Constitution, but as it limited to the event of a citizen suing a State it became conclusive proof that, as to suits between two or more States, or suits by a State against citizens of another State, it was intended that the provisions of the original Constitution should stand. See Curtis on U. S. Const. 2d ed. 15.

*293 A State is also liable to be sued by the United States in this * Court. *United States* v. *Texas,* 143 U. S. 621; on an action of debt. *United States* v. *North Carolina,* 136 U. S. 211.

The United States also may be sued by a State in this court pursuant to a statute. *Minnesota* v. *Hitchcock,* 185 U. S. 373, and see *Cohens* v. *Virginia,* 6 Wheat. 406.

The ground of the jurisdiction is that the States have by adopting the constitution *agreed* to submit controversies between themselves to the determination of this court. *Rhode Island* v. *Massachusetts,* 12 Pet. 720. No exception was made of any possible case which might arise. The settlement of claims by diplomacy or by war was taken away by the Constitution, and it was necessary to make some provision to take their place. Such provision was made by the organization of this court and giving it this jurisdiction. It is most just that the jurisdiction should be exercised where the plaintiff's claim is for the collection of debt; for, when a State enters into the markets of the world as a borrower, she for a time lays aside her sovereignty and becomes responsible as a civil corporation. *Louisiana* v. *Jumel,* 107 U. S. 740; *Murray* v. *Charleston,* 96 U. S. 445. The cases of New Hampshire and New York against Louisiana can be distinguished from this case.

The State of Dakota is competent to become the owner and holder of these bonds. *Texas* v. *White,* 7 Wall. 700. It is incident to the sovereign power both to draw and purchase bills. *United States* v. *Bank,* 12 Pet. 377. Also to become a donee, whether by legacy or otherwise. *Matter of Meriam,* 141 N. Y. 479, 484; *Estate of Cullom,* 5 Misc. N. Y. 173, aff'd 145 N. Y. 593; *United States* v. *Fox,* 94 U. S. 315.

Subd. 1, section 10, article II, of the Constitution, which forbids a State to enter into any agreement or compact with another State, does not affect the right of the complainant to hold these bonds; the compacts or agreements intended are of a political nature, such as could be made between sovereigns only and not ordinary business agreements. *Union Branch R. R. Co.* v. *East Tenn. & Geo. R. R.,* 14 Georgia, 327; 2 Story Com. §§ 1354 and 1401, *et seq.*

*294 A promise to pay money is not * an agreement of the character intended to be prohibited. See 4 Dall. 456; 96 U. S. 445; *Holmes* v. *Jennison,* 14 Pet. 572, citing *Vattel.*

There is nothing in the answer or proofs respecting the gift in controversy in this suit which affects the jurisdiction. The gift was absolute and the State had a right to accept it. See B. R. Curtis in N. Am. Review, January, 1844, and vol. 2, p. 93, of Curtis's Life.

It is impossible to impute to the complainant any improper motive, any more than if the gift had been by a legacy rather than by gift *inter vivos.* But motive, even in a complainant, is immaterial. The only question is, has the complainant a right? Whether acquired with good, bad or indifferent motives is quite immaterial. *Morris* v. *Tuthill,* 72 N. Y. 575; *Rice* v. *Rockefeller,* 134 N. Y. 174;

Ramsey v. *Gould,* 57 Barb. 398; 2 Morawetz on Corporations, § 259, and cases cited; *Pender* v. *Lushington,* L. R. 6 Ch. Div. 75; *Phelps* v. *Nowlen,* 72 N. Y. 39; *McDonald* v. *Smith,* 1 Pet. 620, 624; *Barney* v. *Baltimore,* 6 Wall. 280; *Smith* v. *Kernochan,* 7 How. 198; *Dickerman* v. *Northern Trust Co.,* 176 U. S. 181; *Toler* v. *R. R. Co.,* 67 Fed. Rep. 177.

When the State owns the whole interest, legal and beneficial, in the bonds sued on, which interest it was empowered to acquire and did acquire by virtue of the act of the legislature, by a donation from individuals, it makes no difference that the motive of the donor was the hope that the State would bring suit on the bonds.

The assignment of the bonds of the defendant State to the complainant State carried with it the mortgage of the railroad stock created by the legislature of the defendant State to secure the bonds. *Converse* v. *Michigan Dairy Co.,* 45 Fed. Rep. 18.

The endorsement and delivery operated as an assignment of the mortgage and transferred to the holder of the notes the same equitable rights in the mortgage which he had in the notes. *Cooper* v. *Ulmann,* Walk. Ch. 251; *Briggs*
*295 v. *Hannowald,* * 35 Mich. 474; *Carpenter v. Longan,* 16 Wall. 271; *Kennicott* v. *Supervisors,* 16 Wall. 452; *Ober* v. *Gallagher,* 93 U. S. 199. In these cases though only a portion of the notes or bonds were acquired by the complainant the transfer enabled the complainant to foreclose, because an assignment of a part of the debt, or of one or several bonds or notes, secured by the mortgage carries with it a *proportional* interest in the mortgage.

The defendant State made a statutory mortgage to secure the whole issue of the bonds sued on. The act provided for mortgaging an equal amount of stock as collateral security, for the payment of said bonds. Plainly, the whole amount of shares of stock became security for the whole amount of the bonds. 3 White and Tudor's Leading Cases in Equity, 3d Am. ed., Wallace's notes to the cases of *Row* v. *Dawson* and *Ryall* v. *Rowles,* pp. 369 and 646.

The mortgage is simply security for the debt, and whatever transfers the debt carries with it the mortgage. *English* v. *Carney,* 25 Michigan, 178.

A mortgage given to secure several obligations stands as security for the whole, and if a mortgagee assigns one of the obligations to a third person, the mortgage in equity stands as security for all the obligations, as well for the one assigned as those retained. *Kortlander* v. *Elston,* 52 Fed. Rep. 180, 183; *Matter of Bronson,* 150 N. Y. 20; *Jermain* v. *L. S. Ry. Co.,* 91 N. Y. 483, 492. As to undivided fractional interests in the whole, see *Flynn* v. *Brooklyn City R. R. Co.,* 158 N. Y. 504; *Matter of Fitch,* 160 N. Y. 94; 1 Morawetz on Corp. § § 234, 237. As to rights of the second mortgage bondholders, see *Sager* v. *Tupper,* 35 Michigan, 134; *Wheeler* v. *Menold,* 81 Iowa, 647.

In any aspect of this case, the first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties. Story Eq. Pl. 97, 112; *Florida* v. *Georgia,* 17 How. 510; see also *California* v. *So. Pac. R. R.,* 157 U. S. 229; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199; *Washington State* v. *Northern Securities Co.,* 185 U. S. 255.
*296 * As to making the holders of first mortgage bonds parties, see *Heffner* v. *Life Ins. Co.,* 123 U. S. 747, 754, and cases cited; *Jerome* v. *McCarter,* 94 U. S. 734; *Sutherland* v. *L. S. Co.,* 1 Cent. L. Jour. 127; *McClure* v. *Adams,* 76 Fed. Rep. 899; *Murdock* v. *Woodson,* 2 Dillon, 188; *Board* v. *Min. Pt. R. R.,* 24 Wisconsin, 93; *Campbell* v. *Texas R. R.,* 2 Woods, 263.

The certificate upon the bond, with regard to security for ten shares, being no part of the statute, cannot affect the construction of the statute, as to which the rule is that what is implied in it is as much a part of it as what is expressed.

The intention of the maker of the statute being as much within the statute as it is within the letter, the court has to ascertain the meaning; which was to mortgage all the stock to secure all the bonds, each proportionately. *United States* v. *Babbitt,* 1 Black, 61; *County of Watson* v. *Nat. Bank,* 103 U. S. 770.

As to former litigation in regard to legislation of North Carolina concerning this road, see *Swasey* v. *North Carolina,* 1 Hughes, 17; *R. R. Co.* v. *Swasey,* 23 Wall. 405; *Christian* v. *Atlantic & Nor. Car. R. R. Co.,* 133 U. S. 233. For other cases as to *pro rata* distribution, *Toler* v. *East Tenn. R. R. Co.,* 67 Fed. Rep. 168; *Claflin* v. *S. C. R. R.,* 8 Fed. 118; *Pollard* v. *Bailey,* 21 Wall. 520; *Barry* v. *M. K. & T. Ry.,* 34 Fed. Rep. 829.

In such cases, equities adjudged against parties served with process are binding upon all persons of the same class, although absent from the litigation, because of the vicarious representation in the present litigants of the same class to which they belong. *Morton* v. *New Orleans R. R.,* 75 Alabama, 590, 611. See also *Knickerbocker Trust Co.* v. *Penacook Mfg. Co.,* 100 Fed. Rep. 814; *Dickerman* v. *Nor. Trust Co.,* 80 Fed. Rep. 450.

The construction of the clauses of the Constitution giving jurisdiction to this court over controversies between States and between States and citizens of other States should be liberal in the extreme to favor such jurisdiction and to carry out the beneficent purposes by the Constitution sought to be obtained.

*297 * *Mr. Robert D. Gilmer,* Attorney General of the State of North Carolina, *Mr. George Rountree, Mr. James E. Shepherd* and *Mr. James H. Merrimon* for the defendant, State of North Carolina:

The court is without jurisdiction to make any decree against the State of North Carolina in this cause. A sovereign cannot be sued. *Belknap* v. *Schild,* 161 U. S. 10; *The Siren,* 7 Wall. 152; *Smith* v. *Weguelin,* L. R. 1869, 8 Eq. 198; *Briggs* v. *Light Boats,* 11 Allen, 157. This rule applies to suits brought in the Federal courts against either of the States of this Union. *Beers* v. *Arkansas,* 20 How. 527; *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Cunningham* v. *M. & B. R. R.,* 109 U. S. 446; *Hans* v. *Louisiana,* 134 U. S. 1; *Louisiana* v. *Texas,* 176 U. S. 1. The State did not consent to the exercise of jurisdiction by pleading to the merits. *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *Minnesota* v. *Hitchcock,* 185 U. S. 373; 12 Ency. Plead. & Prac. pp. 127, 188, 191; *Penn* v. *Lord Baltimore,* 1 Vesey, Sr. 444; Justice Iredell's opinion in the *Chisholm Case,* 2 Dall. 429.

Apparently, there was bill, answer and proof in *New Hampshire* v. *Louisiana,* 108 U. S. 76, and yet the court dismissed the cause for want of jurisdiction.

This court has jurisdiction of the parties, provided it be such a "controversy between two or more States" as is contemplated in the grant of judicial power by Art. III, sec. 2, of the Constitution, and if it be not such a controversy the objection may be taken at any time. Equity Rule, 29; 1 Foster's Fed. Prac. 241, 249, 535, 536; *Indiana* v. *Tolliston Club,* 53 Fed. Rep. 18. The only authority competent to give consent for the State to be sued is the general assembly of the State. *Moody* v. *State Prison,* 128 N. Car. 12. This has not been done. If a State consents to be sued the consent can be withdrawn at any time, as it has been by the protest of the State. *Beers* v. *Arkansas,* 20 How. 527; *Mighell* v. *Sultan of Johore,* 1894, 1 Q. B. 149; Judgment of Lord Esher.

The State did not consent to be sued in a cause like this by becoming a member of the United States and subscribing to the Constitution. The present suit is not such a "controversy between two or more States" as was con-
*298 templated by the * Constitution of the United States. There are many cases in which this court has decided against the jurisdiction which seemed to come within the words of the Constitution. *Kentucky* v. *Dennison,* 24 How.

66; *Mississippi* v. *Johnson,* 4 Wall. 475; *Georgia* v. *Stanton,* 6 Wall. 50; *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 287; *Hans* v. *Louisiana,* 134 U. S. 1; *Louisiana* v. *Texas,* 176 U. S. 1.

The grant was of "judicial power," hence, controversies not properly subject, according to the accepted principles of jurisprudence, to judicial determination, were not included. *Louisiana* v. *Texas,* 176 U. S. 1, 18. The word "controversies" is not defined in the Constitution, but *all* controversies were not intended, because the word "all," which had been used in the preceding grants, was dropped here and purposely. 2 Bancroft's History of the Constitution, 199, 200, 212; *Rhode Island* v. *Massachusetts,* 12 Pet. 721.

The controversies intended by the framers of the Constitution were naturally akin to those with which they had become familiar from the experience of the colonies, such as those growing out of claims for soil, territory, jurisdiction and boundary. *United States* v. *Texas,* 143 U. S. 621, 639; Story on the Constitution, § § 1674, 1675.

The dispute must arise directly between the States and not be an assumed quarrel. As to the nature of the controversy, see The Federalist, No. 80. Until recently this court has entertained jurisdiction only in boundary disputes. In each of the only two cases recently brought, *Missouri* v. *Illinois,* 180 U. S. 208; *Kansas* v. *Colorado,* 185 U. S. 125, the controversy arose directly between the contending States, and was not factitious—made by the voluntary action of the complaining State by assuming a controversy already existing and with which it had no proper concern. Practices such as were complained of in *Missouri* v. *Illinois,* and *Kansas* v. *Colorado,* as well as the cases of disputed boundary, might lead to war between independent nations; but surely there was no absolute necessity in order to prevent an "appeal to the sword" for a tribunal to
*299 collect ordinary debts; loans due by a State to * private individuals, and which they, being unable to collect, voluntarily assign to another State.

While writers on international law differ somewhat among themselves, many of those of greatest authority say that it is the practice of nations, when petitioned by their citizens, to intervene for the enforcement of obligations due by other nations to them, to make a distinction between such obligations as are contractural —loans voluntarily entered into with a knowledge of all the risks and the inability of collection by suit—and such as are tortious. They generally refuse to interfere for the collection of debts, but do, for the redress of other kinds of grievances. 1 Halleck International Law, 435, and note; Hall's International Law, 3d ed. 277; *New Hampshire* v. *Louisiana,* 108 U. S. 76.

And such has been the practice of England and the United States. Wharton's Digest Int. Law, § 231; 5 Am. State Papers, 1823 (For. Rel.), 403; British Quarterly Review, Jan. 1876, p. 54; Mr. Balfour in the House of Commons, December 15, 1902, as to Venezuelan question.

But it is understood that the contention of complainant's counsel is that this suit is brought in vindication of its property rights, and there are several cases in which this court has entertained original bills to protect the proprietary rights of a State against injury or infringement by *individuals,* such as *Georgia* v. *Brailsford,* 2 Dall. 402; *Pennsylvania* v. *Wheeling Bridge Company,* 13 How. 618; *Texas* v. *White,* 7 Wall. 700; *Florida* v. *Anderson,* 91 U. S. 667; *Alabama* v. *Burr,* 115 U. S. 413.

The fact that the suit is brought in vindication of the property rights of the complaining State is also not conclusive. In *New Hampshire* v. *Louisiana,* 108 U. S. 76, and *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, property rights were involved; but the court declined jurisdiction on account of the nature of the title and the method and purpose of its acquirement, and see as to validity of assignment, *Walker* v. *Bradford Bank,* 12 Q. B. D. 1883, 84, 511.

As to the sovereignty of the States, see *Pennoyer* v. *Neff,* 95 U. S. 714; *Lane County* v. *Oregon,* 7 Wall. 71; *Martin* v. *Hunter,* 1 Wheat. 325;
*300 *Buckner* v. *Finaley,* 2 Pet. 586; Cooley * Const. Lim. 29; The Federalist XXXII; Woodrow Wilson, The State, 469; *Mayor &c.* v. *Miln,* 11 Pet. 102; *United States* v. *Guthrie,* 17 How. 284; *Stanley* v. *Schwalby,* 147 U. S. 508; *Kentucky* v. *Dennison,* 24 How. 66; *Cherokee Nation* v. *Georgia,* 5 Pet. 1.

As to the general rule of sovereignty the nature of things opposes the opinion that the judicial tribunals should be competent to determine that the government is a debtor. Dalloz Jur. Gen. Verbo. Tresor. Pub., No. 383; Dufour, Droit, Adm't, 4, 629; 3 Proudhon Dom. de Prop., No. 826, p. 67.

The history of our country shows that the government has habitually determined the claims to be adjusted; the medium of payment, and the persons to be paid; Confederations, Union and States have exercised their sovereign rights. Hamilton's Report in 1792 and 1795; 2 Cong. Annals, 1792; 3 Cong. Annals 1362; 2 Pitkin Civil Hist. 336; 3 Writings Gallatin, 121, 143; Ordronaux on Constitutional Legislation, 283.

A State is not liable to suit upon its bonds either by an individual or another State. Such suits against States were unheard of at the time of the adoption of the Constitution and the power to bring them would not have been included if the proposition had been made. *Bank of Washington* v. *Arkansas,* 20 How. 530, 532; Webster's Opinion to Baring Bros. & Co., 1836, Works, vol. 1, p. 637; *Briscoe* v. *Bank,* 11 Pet. 257, 321; *Crouch* v. *Credit Foncier,* 8 Q. B. 1872, 73, 374, 384; Hamilton's Report, 1795; Annals of Cong. 1793, 5, 3d Congress, p. 1635.

What was not contemplated by the framers of the Constitution is not included in the grant of judicial power. Campbell, J., in dissenting opinion, *Florida* v. *Georgia,* 17 How. 513. This view was apparently adopted by Marshall, C. J., in his decision as to the status of Indian tribes, in *Cherokee Nation* v. *Georgia,* 5 Pet. 1.

A suit cannot usually be maintained against a State to compel the payment of its debts, as it might necessitate an interference with, if not the complete control and direction of, the legislative function of assessing, levying, collecting and distributing taxes, which is, as yet, beyond the competency of courts; there is
*301 no means of rendering the decree effective, * unless this court is prepared to appoint a receiver with the extraordinary powers of taking charge of and administering the affairs of a delinquent State. The separation and careful demarkation of the functions of government into executive, legislative and judicial, is the distinguishing characteristic of our Constitution, state and national, and neither department can transgress its proper bounds. *People ex rel. Broderick* v. *Morton,* 156 N. Y. 136; *Cherokee Nation* v. *Georgia,* 5 Pet. 1; Dicey on Conflict of Laws, 38; Miller on the Constitution, 314, and notes by Davis to same, 423; Justice Iredell's dissent in *Chisholm's Case,* 2 Dall. 445; *United States* v. *North Carolina,* 136 U. S. 211; cited in *United States* v. *Texas,* 143 U. S. 642, is not controlling as the State consented to be sued. Dicey on Conflict of Laws, 212; see *United States* v. *Guthrie,* 17 How. 284, 303. The States are sovereign within the province of their reserved powers, including the management of their fiscal affairs. By the constitution of North Carolina, Art. 14, sec. 3, "no money shall be drawn from the treasury but in consequence of appropriations made by law;" and the courts cannot direct the State Treasury to pay a claim against the State, however just and unquestioned, where there is no legislative appropriation to pay the same. *Garner* v. *Worth,* 122 N. C. 260; *Railroad* v. *Jenkins, Treasurer,* 68 N. C. 499; *Shaffer* v. *Jenkins, Treasurer,* 72 N. C. 275.

In many of the cases in this court in which attempts have been made to collect debts from States, there have been strong intimations that over and above

the objection that States are exempt from suit by the Eleventh Amendment, courts had no process by which they could collect debts from States. *Marye* v. *Parsons,* 114 U. S. 325; *In re Ayers,* 123 U. S. 443, 491; *Rees* v. *City of Watertown,* 19 Wall. 107; see also *Heine* v. *The Levee Commissioners,* 19 Wall. 655, 661; 8 Rose's Notes on United States Reports, 233; W. H. Burroughs in Virginia Law Journal, March, 1879. The fact that there is property mortgaged to secure the bonds does not relieve the court from being obliged to take charge of the treasury of the State. See *Northwestern M. L. Assn.* v. *Keith* as to Equity
*302 Rule 92 as to deficiency judgment. This court * rather than merely adjudge the indebtedness leaving it optional with the defendant State to pay it will decline to take jurisdiction at all. *Kentucky* v. *Dennison,* 24 How. 66; no court sits to determine law *in thesi. Marye* v. *Parsons,* 114 U. S. 330; *Broderick* v. *Morton,* 156 N. Y. 136.

If a suit can be brought upon the bonds of a State by another State, no such suit can be brought upon bonds transferred to the State merely because the holder of them cannot collect them.

If for any reason the court can take jurisdiction of a suit against a State for the collection of a debt its compulsive process should be confined to debts due directly to the complaining States upon dealings, contracts, transactions between the States, or at any rate to obligations acquired "in due course of trade," if such an acquisition be possible. 1 Kent's Commentaries, 297, note *d;* Langdell's Treatise on Equity Pleading, 209; and see Fed. Cas. No. 1007.

Jurisdiction over controversies between two or more States was given to the Supreme Court for the purpose of settling disputes—allaying strife—and not for the purpose of fomenting quarrels. What surer method of arousing jealousies, engendering hostilities and retaliations can be conceived than by encouraging such suits between States? Such, at any rate, is the teaching of experience.

A sovereign State cannot be forced into court against her consent; but a cross bill presupposes that the plaintiff is already in court rightfully, and when the State comes into court of her own accord and invokes its aid, she is, of course, bound by all the rules established for the administration of justice between individuals. *P. R. & Ry. Co.* v. *So. Car.,* 60 Fed. Rep. 552; *Prioleau* v. *United States,* L. R. 2 Eq. 659; *The Siren,* 7 Wall. 152, and see also for illustrations of these principles, *Brent* v. *Bank of Washington,* 10 Pet. 596; *United States* v. *Bank of Metropolis,* 15 Pet. 377; *The Davis,* 10 Wall. 15; *United States* v. *Ingate,* 48 Fed. Rep. 251; *United States* v. *Flint,* Fed. Cas. No. 15,121; *United States* v. *Wilder,* Fed. Cas. No. 16,694; *United States* v. *Union Nat. Bank,* Fed. Cas.
*302 No. 16,597; *United States* v. *Barker,* Fed. * Cas. No. 14,520. Although a government, state or national, is not barred by the statute of limitations, a claim barred by the statute and assigned to the government cannot be sued on, as it has no more validity after than before the assignment. *United States* v. *Buford,* 3 Pet. 12; *United States* v. *N. C. & St. L. R. Co.,* 118 U. S. 125; 1 Cooley's Blackstone, 247, note 6. A contract cannot be assigned if by the assignment a greater obligation is thereby imposed. *Tolehurst* v. *Ass. Port. Cement Mfrs.,* 1901, 2 K. B. 811; 18 Law, Quarter. Review, 10; Dicey on Conflict of Laws, 534; *Edwards* v. *Kearsey,* 96 U. S. 595, 600; *Chisholm's Case,* opinion of Jay, Ch. J. 2 Dall. 479; Pollock on Contracts, 294; *Hager* v. *Swayne,* 149 U. S. 242, 248; *Ball* v. *Halsey,* 161 U. S. 72, 80.

The adoption of the Eleventh Amendment and the alarm over the decision in the *Chisholm* case was not so much the apprehension of a loss of dignity in being haled before a court, as the danger of being compelled, by legal process, to pay their debts—the danger of having their complex fiscal affairs taken out of the control of the proper state officers and placed in the hands of this court.

Cohens v. *Virginia,* 6 Wheat. 246, 406, and see Alexander Hamilton in The Federalist No. 81; Miller on the Constitution, 382, and Davis's notes to same, 652, 653; Judson's Constitutional History of United States, 255. Individuals should not be allowed to enforce compromises for one State by threat of assignment to another State. Taking jurisdiction of this action would result in a vast number of similar claims being made which would not be confined exclusively to public securities but would extend to claims of all kinds. What then becomes of the reserved rights of the States to manage their own domestic affairs? There is scarcely any State which may not be thus called to the bar of this court. Even in Massachusetts claims have been made which the Supreme Court of that State regarded as just, as between man and man, but which it could not enforce against the State for lack of jurisdiction. *Murdock Grate Co.* v. *Commonwealth,* 152 Massachusetts, 28.

*304 There is no absolute necessity for such jurisdiction in this * court; we have lived for more than a century without its exercise; that it does not exist is made probable by the fact that it has not previously been invoked, although the circumstances which gave rise to it have existed from the beginning. The novelty of an action, under such circumstances, is strong evidence that it is groundless. *Mississippi* v. *Johnson,* 4 Wall. 475, 500; *Mogul Case* (1892), A. C. 25. And see article by Carmon F. Randolph, in the number of the Columbia Law Review, May, 1902, "Notes on Suits Between States."

Even if suits can be brought against a State upon bonds so assigned to another State, the present suit cannot be maintained, because it is a suit by the State of South Dakota and an individual representing all individual bondholders of the same class, against the State of North Carolina and another representing all the first mortgage bondholders. 1 Daniel's Chancery Practice, 6th Am. ed. 191, note; as to Judiciary Act of 1789, see *Coal Co.* v. *Blatchford,* 11 Wall. 172; but under the act of 1875, see *Removal Cases,* 100 U. S. 457; 9 Rose's Notes, 850; *Osborne* v. *The Bank,* 9 Wheat, 739, has been overruled on the point that the court would look to the parties on the record and the court will now look beyond to the result of the suit. *In re Ayres,* 123 U. S. 443; *Missouri &c. Ry. Co.* v. *Missouri Road &c. Commrs.,* 183 U. S. 59. The original jurisdiction of this court is limited and should be sparingly exercised. *California* v. *Southern Pacific Ry. Co.,* 157 U. S. 261; *Florida* v. *Georgia,* 17 How. 478, 504.

The Circuit Court has no jurisdiction unless each one of the plaintiffs arranged according to their real interest can maintain a suit against each one of the defendants, arranged according to their real interest in the controversy. *Removal Cases,* 100 U. S. 457; *Strawbridge* v. *Curtiss,* 3 Cranch, 267; *Smith* v. *Lyon,* 133 U. S. 319. In *New Orleans Pacific Railway* v. *Parker,* 143 U. S. 58, if a suit is instituted between competent persons, others having the requisite interest are entitled to intervene, and if they do intervene, and do not have the requisite diversity of citizenship, the jurisdiction of the court is ousted. *Mangles* v. *Donan Brewing Co.,* 53 Fed. Rep. 515; Cook on Stockholders, 3d ed. sec.

*305 827, note 2; *Morris* v. *Gilmer,* 129 * U. S. 315; *Tug River C. & S. Co.* v. *Brigel,* 67 Fed. Rep. 625; *Consolidated Water Co.* v. *Babcock,* 76 Fed. Rep. 243, 248; *Board of Trustees* v. *Blair,* 70 Fed. Rep. 416.

If this be required merely because the Judiciary Act only confers jurisdiction on the Circuit Court of controversies between the citizens of different States, *a fortiori,* ought it to be so held when the Constitution confers jurisdiction upon this court only of controversies between two or more States and the Eleventh Amendment expressly prohibits suits by individuals against a State?

Nor is it possible to escape the force of this argument by saying that the individuals are not necessary parties to the suit. It would scarcely lie in the mouth

of the complainant to say this, because she has elected to bring the suit in the present form and with the present parties, but, if she did, the objection would be futile, because they are necessary parties. *California* v. *Southern Pacific Ry. Co.*, 157 U. S. 229, 257; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

Even if the parties were re-arranged according to their real interest in the controversy, the result of a successful prosecution of this suit will equally be to enable the individual holders of the second mortgage bonds to collect them from the State by suit against her consent, contrary to the provisions of the Eleventh Amendment, which would contravene the spirit of the amendment.

The general rule for the construction of a constitutional provision is so to construe it as to subserve its general purpose, *Legal Tender Case*, 12 Wall. 531, and that rule has been applied with liberality to the Eleventh Amendment. *Fitts* v. *McGhee*, 172 U. S. 516, 528; dissent of Bradley, J., in *Virginia Coupon Cases*, 114 U. S. 332; *Hans* v. *Louisiana*, 134 U. S. 1. The Constitution prohibits things —not names. *Craig* v. *Missouri*, 4 Pet. 410, 435.

That which cannot be done directly cannot be done indirectly—the immunity of a sovereign from suit is not easily to be destroyed. In the *Parlement Belge*, 5 L. R. P. D. 197, 219, a libel was dismissed against a public ship although
*306 the sovereign was not a defendant; and see *Cunningham* v. *M.* * *& B. R. R.*, 109 U. S. 446; *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149, 154; *Jarbolt* v. *Moberly*, 103 U. S. 580, 585; *Ex parte Garland*, 4 Wall. 334, 338.

To sustain this action and give judgment in accordance with the prayer will be to accomplish an unconstitutional result, and that by indirection.

This suit is commenced and prosecuted by, or for the benefit of, individuals. Under *New Hampshire* v. *Louisiana*, 108 U. S. 76, 89, an individual cannot invoke the original jurisdiction of this court in a suit against one State by using the name of another State—a State cannot maintain a suit against another State on behalf of private individuals.

The facts clearly show that the suit was commenced, and is prosecuted, solely for the benefit of the private bondholders, and in the event of recovery they are the sole beneficiaries after deducting, of course, the expenses of the suit, including the fee to South Dakota. The prohibitions of the Eleventh Amendment can not so easily be nullified.

On the merits; the bonds were disposed of contrary to the provisions of the enabling statute, c. 228, Acts North Carolina, 1854, 55, and are, therefore, illegal and uncollectible. See § § 8, 35, 37.

As to the position of complainant that whether the bonds were illegally issued and sold or not, is immaterial to a holder for value in due course, it must be, of course, through the merit of some antecedent holder, for complainant not only took the bonds after their maturity, but paid nothing for them.

Admitting presumptions in favor of a holder of negotiable paper, the law is that when proof has been given of fraud or illegality in the issue of paper, the burden is cast upon complainant to show that it is a purchaser for value without notice and in due course. *Smith* v. *Sac County*, 11 Wall. 139; *Combs* v. *Hodge*, 21 How. 397; *Collins* v. *Gilbert*, 94 U. S. 753; *Stewart* v. *Lansing*, 104 U. S. 505.

As these bonds were issued and disposed of contrary to the provisions of the enabling statute, they were illegal, and complainant's receiving the bonds as a donation, and after their maturity, casts the burden of proof upon her to
*307 show that some * one of her predecessors in title were innocent purchasers for value, and this she has not done.

As the Schafers, who are the only persons whose title complainant rests upon, purchased these state bonds with overdue interest coupons attached and at a small percentage of their face value, they are deprived of the protection given to

bona fide purchasers for value in due course. *Hulbert* v. *Douglas,* 94 N. C. 122; *Farthing* v. *Dark,* 109 N. C. 291; *Parsons* v. *Jackson,* 99 U. S. 434, 444; 9 Rose's Notes, 737; *Railway Co.* v. *Sprague,* 103 U. S. 756; *London Joint Stock Bank* v. *Simmons,* 1892, A. C. 201, 221. The circumstances were sufficient to put a reasonable person on notice that there was something wrong, and inquiry would have disclosed that they were not issued in accordance with the statute. *Trask* v. *Jacksonville &c. R. R. Co.,* 124 U. S. 515.

If, however, the Schafers were *bona fide* holders for value, as the bonds were not suable in their hands, they ought not to become suable in the hands of a transferee unless that transferee took them for value and without notice of dishonor, even if such controversies are within the jurisdiction of this court. A transferee has no higher or further rights than the transferer, unless in the exceptional cases under our recording acts and negotiable paper taken for value before maturity and without notice. To permit the State of South Dakota to collect these bonds by suit, whether they were illegally issued or not, will be to add another exception to the rule that a man cannot give what he does not own or possess.

The provisions of the law, Act, 1866, 67, North Carolina, chapter 106, authorizing a mortgage upon the State's stock in the North Carolina Railroad in favor of the holders of the bonds of the class sued on were not complied with, and the mortgage is invalid.

In the indorsement upon the bonds, purporting to give a statutory mortgage upon the State's stock, no stock was designated or described in such way as to be capable of identification, and, therefore, no particular stock has been subjected to the lien of a mortgage. The statute authorized a mortgage in favor of
*308 the holders of the bonds, but it has never been executed, * and the only claim which the holders of the mortgage have against the State is, not a lien upon any particular stock owned by the State, but a cause of action for the breach of contract to give the mortgage. In North Carolina, by whose law the validity of the mortgage is to be determined, a mortgage purporting to be upon a certain number of things, out of a large number, and in no other wise designated, is invalid as a mortgage. *Waldo* v. *Belcher,* 11 Iredell L. 609; *Blackley* v. *Patrick,* 67 N. C. 40; *Stevenson* v. *Railroad,* 86 N. C. 445; *Holmes v. Whitaker,* 119 N. C. 113; Jones on Chattel Mortgages, 56; *Kilgore* v. *New Orleans Gas Co.,* 2 Woods. 144.

The claim on behalf of the mortgage is not stronger in equity than at law, because in order to constitute an equitable mortgage, it is equally necessary to identify the subject-matter. *Halroyd* v. *Marshall,* 10 H. L. 189; *Walker* v. *Brown,* 165 U. S. 654; 19 Enc. of Law, page 14, and authorities. The same rule prevails in actions for the specific performance of a contract. *Lighthouse* v. *Third National Bank,* 162 N. Y. 336. The law is the same, whether the alleged mortgage be statutory or conventional. Jones on Liens, § 106; *Tycross* v. *Dreyfus,* 5 Chi. Div. 605.

If the court has jurisdiction of the cause, and complainant is entitled to recover anything, she is not entitled to recover interest upon overdue coupons. *United States* v. *North Carolina,* 136 U. S. 211.

Mr. Daniel L. Russell, with whom *Mr. Marion Butler* and *Mr. Alfred Russell* were on the brief, for defendant Charles Salter and the second mortgage bondholders.

The first and second mortgage bondholders being interested in the funds must be made parties to the suit, citing cases on complainant's brief and Jones on Mortgages, § 1369; *Wilkins* v. *Frye,* 1 Mer. 244, 262; *Hancock* v. *Hancock,* 22

N. Y. 568; *Carpenter* v. *O'Dougherty,* 58 N. Y. 681; *Rankin* v. *Major,* 9 Iowa 297; *Thayer* v. *Campbell,* 9 Missouri, 280. The second mortgage is *in solido* and not a separate and independent mortgage of ten shares for each bond. See cases cited in complainant's brief. The motives of the donor in making the gift
*309 * to the complainant State are not material. See cases cited in complainant's brief. As to the turpitude of repudiation and the obligation of a State to pay its debts, see *Louisiana* v. *Jumel,* 107 U. S. 740; *Murray* v. *Charleston,* 96 U. S. 445.

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

There can be no reasonable doubt of the validity of the bonds and mortgages in controversy. There is no challenge of the statutes by which they were authorized. By those statutes the treasurer was directed, when it became necessary to borrow money for the payment of the subscription, to prepare coupon bonds and advertise in one or more newspapers for sealed proposals, and to accept the terms offered most advantageous to the State, provided that in no event should the bonds be sold for less than their par value. The advertisement was made, no bids were received, but the bonds were delivered to the railroad company as payment for the subscription, dollar for dollar. Upon each bond was placed the statutory pledge or mortgage. It is true no money was paid into the treasury and thence out of the treasury to the railroad company, yet looking at the substance of the transaction (and equity has regard to substance rather than form), the transaction was the same as though the company had been the only bidder, had placed a thousand dollars in the treasury in payment of each bond and received that thousand dollars back from the treasury in payment of the subscription for ten shares of stock. It is true also that there was no formal issue of certificates by the company to the State, but that was a matter of arrangement between the parties to the subscription. The State's right as a stockholder was not abridged by lack of the certificates, and in fact it has been receiving dividends on the stock exactly as though certificates had been issued. The statute also provided that with each several bond a deed of mortgage for an equal amount of stock, signed by the treasurer and countersigned by the comptroller, should constitute a part of the bond and be transferable in like manner with it, "and further,
*310 that such mortgage shall have all the force and effect * in law and equity, of registered mortgages without actual registry." While no certificate of stock was to be attached to or go with the bond the statute evidently contemplated that the mortgage endorsed on the bond should have the same force and effect. Hence, when the endorsement was made and the bond issued by the State it was tantamount to a separation and identification of the number of shares named therein. It cannot be that the State having provided this means of giving to each bond the mortgage security of the corresponding shares of stock can now prevent the attaching of the lien on the ground that no shares had been separated and no certificate transferred. It is unnecessary to refer to chap. 98 of the Laws of 1879, for that act was one in the nature of an offer to compromise, although it does contain a recognition of outstanding obligations.

Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the State as representative of individual owners, as in the case of *New Hampshire* v. *Louisiana,* 108 U. S. 76, for they were given

outright and absolutely to the State. It is true that the gift may be considered a rare and unexpected one. Apparently the statute of South Dakota was passed in view of the expected gift, and probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds. But the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction. This has been often ruled. In *McDonald* v. *Smalley,* 1 Pet. 620, an objection to the jurisdiction on the ground that the title to the property in controversy had been conveyed to the plaintiff in the belief that it would be sustained by the Federal when it would not be the state court, was overruled, with this observation by Chief Justice Marshall (p. 624):

"This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties.
*311 McDonald could not have maintained * an action for his debt, nor McArthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit, are citizens of different States."

See also *Smith* v. *Kernochen,* 7 How. 198; *Barney* v. *Baltimore,* 6 Wall. 280; *Dickerman* v. *Northern Trust Co.* 176 U. S. 181, 190, 191, 192. In this last case Mr. Justice Brown, speaking for the court, said:

"If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defence to a foreclosure that the mortgagee was animated by hostility or other bad motive. *Davis* v. *Flagg,* 35 N. J. Eq. 491; *Dering* v. *Earl of Winchelsea,* 1 Cox Ch. 318; *McMullen* v. *Ritchie,* 64 Fed. Rep. 253, 261; *Toler* v. *East Tenn. &c. Railway,* 67 Fed. Rep. 168. . . . The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. *McDonald* v. *Smalley,* 1 Pet. 620; *Smith* v. *Kernochen,* 7 How. 198; *Barney* v. *Baltimore,* 6 Wall. 280; *Farmington* v. *Pillsbury,* 114 U. S. 138; *Crawford* v. *Neal,* 144 U. S. 585.

"The law is equally well settled that, if a person take up a *bona fide* residence in another State, he may sue in a Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were
*312 a resident of the State in which the court was held. *Cheever* v. * *Wilson,* 9 Wall. 108, 123; *Briggs* v. *French,* 2 Sumn. 251; *Catlett* v. *Pacific Ins. Co.,* 1 Paine, 594; *Cooper* v. *Galbraith,* 3 Wash. 546; *Johnson* v. *Monell,* Wool. 390."

The title of South Dakota is as perfect as though it had received these bonds directly from North Carolina. We have, therefore, before us the case of a State

with an unquestionable title to bonds issued by another State, secured by a mortgage of railroad stock belonging to that State, coming into this court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt.

Has this court jurisdiction of such a controversy, and to what extent may it grant relief? Obviously that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the Federal court of a State of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another State. The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too, the subject-matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay—and if it be justiciable does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual and by him sold or donated to the former.

A preliminary question arises from the fact that representatives of the two classes of bonds are made defendants, and that a part of the relief asked is a sale of the thirty thousand shares of stock of the North Carolina Railroad Company, belonging to the State of North Carolina, in satisfaction and discharge of
*313 all the mortgages upon such stock. It is insisted * that these individuals, owners of the bonds, although named as defendants, are in fact occupying an adverse position to that of the State, and that the effect of their presence as parties is a practical nullification of the Eleventh Amendment, in that it is giving to individuals relief by judgment against the State. Apparently one expectation of the donor to South Dakota was that in some way the bonds retained by himself would be placed in judgment and relief obtained against North Carolina in the suit commenced by South Dakota. But we think that these individuals are not necessary parties-defendant, and that no relief should be given to them or to the classes of bondholders they represent. The statute under which the mortgage was executed provided that with each of the bonds a deed of mortgage for a like amount of stock should be executed by the State. There is, therefore, a separate mortgage of ten shares of stock on each one of these bonds, and that mortgage can be fully satisfied by a decree of foreclosure and sale of the ten shares of stock. No one would doubt that, if a certificate of stock was attached as a pledge to a note, the pledge could be satisfied by a sale of the stock without any determination of the rights of the purchaser as between himself and other stockholders. And such was the manifest purpose of this legislation. It contemplated that each bondholder should receive a stock security which he could realize on without the delay and expense of a suit to which all other stockholders and the corporation would be necessary parties. The purchaser at the sale to be authorized by this decree will become vested with the full title of the State to the number of shares of stock stated in the mortgage. He will occupy the same position in relation to the corporate property that other stockholders occupy, and have whatever rights they have. It is not necessary for a full satisfaction of the mortgage on one

of these bonds that any other mortgage upon another bond be also foreclosed, or that a decree be entered determining what rights the purchaser will have by virtue of the stock which he obtains at the sale. So far then as these individual
*314 defendants * are concerned, the suit will be dismissed with costs against South Dakota.

Coming now to the right of South Dakota to maintain this suit against North Carolina, we remark that it is a controversy between two States; that by sec. 2, art. III, of the Constitution, this court is given original jurisdiction of "controversies between two or more States." In *Missouri* v. *Illinois and the Sanitary District of Chicago,* 180 U. S. 208, Mr. Justice Shiras, speaking for the court, reviewed at length the history of the incorporation of this provision into the Federal Constitution and the decisions rendered by this court in respect to such jurisdiction, closing with these words (p. 240):

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State."

The present case is one "directly affecting the property rights and interests of a State."

Although a repetition of this review is unnecessary, two or three matters are worthy of notice. The original draft of the Constitution reported to the convention gave to the Senate jurisdiction of all disputes and controversies "between two or more States, respecting jurisdiction or territory," and to the Supreme Court jurisdiction of "controversies between two or more States, except such as shall regard territory or jurisdiction." A claim for money due being a controversy of a justiciable nature, and one of the most common of controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court. In the subsequent revision by the convention the power given to the Senate in respect to controversies between the States was stricken out as well as the limitation upon the jurisdiction of this court, leaving to it in the language now found in the Constitution jurisdiction without any limitation of "controversies between two or more States."
*315 The Constitution as it originally stood also gave to this * court jurisdiction of controversies "between a State and citizens of another State." Under that clause *Chisholm* v. *Georgia,* 2 Dall. 419, was decided, in which it was held that a citizen of one State might maintain in this court an action of assumpsit against another State. In consequence of that decision the Eleventh Amendment was adopted which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." It will be perceived that this amendment only granted to a State immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more States. In respect to this it was said by Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 406:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained,

this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not
*316 much reason to fear that foreign or sister States would * be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

In the same case, after referring to the two classes of cases, jurisdiction of which was vested in the courts of the Union, he said (p. 378):

"In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' and 'between a State and foreign States, citizens or subjects.' If these be the parties it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

In *Rhode Island* v. *Massachusetts,* 12 Pet. 657, this court sustained its jurisdiction of a suit in equity brought by one State against another to determine a dispute as to boundary, and in the course of the opinion, by Mr. Justice Baldwin, said in respect to the immunity of a sovereign from suit by an individual (p. 720):

"Those States, in their highest sovereign capacity, in the convention of the people thereof, . . . adopted the Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power, (6 Wheat. 378, 380,) as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."

And, again, in reference to the extent of the jurisdiction of this court (p. 721):

*317 * "That it is a controversy between two States, cannot be denied; and though the Constitution does not, in terms, extend the judicial power to *all* controversies between two or more States, yet, it in terms excludes *none* whatever may be their nature or subject."

In *United States* v. *North Carolina,* 136 U. S. 211, we took jurisdiction of an action brought by the United States against North Carolina to recover in-

terest on bonds, and decided the case upon its merits. It is true there was nothing in the opinion in reference to the matter of jurisdiction, but as said in *United States* v. *Texas,* 143 U. S. 621, 642:

"The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina,* 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State."

See also *United States* v. *Michigan,* 190 U. S. 379, decided at the last term, in which a bill in equity for an accounting and a recovery of money was sustained. Mr. Justice Peckham, delivering the unanimous opinion of the court, said (pp. 396, 406):

"By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although
*318 it is not literally * between two States, the United States being a party on the one side, and a State on the other. This was decided in *United States* v. *Texas,* 143 U. S. 611, 642. . . . There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defence to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon."

We are not unmindful of the fact that in *Hans* v. *Louisiana,* 134 U. S. 1, Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisholm* v. *Georgia,* but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the Eleventh Amendment according to its spirit rather than by its letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State. Without noticing in detail the other cases referred to by Mr. Justice Shiras in *Missouri* v. *Illinois, et al., supra,* it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another to enforce a property right. *Chisholm* v. *Georgia* was an action of assumpsit, *United States* v. *North Carolina* an action of debt, *United States* v. *Michigan* a suit for an accounting, and that which was sought in each was a money judgment against the defendant State.

But we are confronted with the contention that there is no power in this

court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county or State is exempt from seizure upon execution because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes. *Meriwether* v. *Garrett,* 102 U. S. 472, 513.

*319 * As a rule no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature.

In *Rees* v. *City of Watertown,* 19 Wall. 107, 116, 117, we said:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

See also *Heine* v. *The Levee Commissioners,* 19 Wall. 655, 661; *Meriwether* v. *Garrett, supra.*

In this connection reference may be made to *United States* v. *Guthrie,* 17 How. 284, in which an application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary, and in which we said (p. 303):

"The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal government or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori,* to every mind, that a treasury, not fenced round or shielded by fixed and

*320 established modes and rules of administration, but which * could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime,* or, rather under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests."

Further, in this connection may be noticed *Gordon* v. *United States,* 117 U. S. 697, in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress power to enforce

its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704):

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. . . . Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress." See also *In re Sanborn,* 148 U. S. 222, and *La Abra Silver Mining Company* v. *United States,* 175 U. S. 423, 456.

We have, then, on the one hand the general language of the Constitution vesting jurisdiction in this court over "controversies between two or more States," the history of that jurisdictional clause in the convention, the cases of *Chisholm* v. *Georgia, United States* v. *North Carolina* and *United States* v. *Michigan,*
*321 (in which this court sustained jurisdiction over actions * to recover money from a State,) the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State. That the State is a necessary party to the foreclosure of the mortgage was settled by *Christian* v. *Atlantic & North Carolina Railroad Company,* 133 U. S. 233. Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency, to be determined when, if ever, it arises. And surely if, as we have often held this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400), (no interest being recoverable, *United States* v. *North Carolina,* 136 U. S. 211), and that the same are secured by one hundred shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the
*322 Marshal of this court, directing him to sell * at public auction all the interest of the State of North Carolina in and to one hundred shares of the

capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.

And either of the parties to this suit may apply to the court upon the foot of this decree, as occasion may require.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE MCKENNA and MR. JUSTICE DAY, dissenting.

The decision in this case seems to me to disregard an express and absolute prohibition of the Constitution. The facts are stated in the opinion of the court. As, however, there are some facts deemed by me to be material, which are not referred to, it is proposed to make a summary of the case, and then express the reasons which control me.

In the years 1847 and 1855 the negotiable bonds of the State of North Carolina were issued to aid in the construction of the railway of the North Carolina Railroad Company and were exchanged for the stock of that company. The bonds went into the hands of individuals and the exchanged stock passed into the possession of the State, and was declared to be pledged in the hands of the State to secure the payment of the bonds in question.

In 1855 and 1866 similar aid was given to another railway, the Western North Carolina. Bonds, each for the par value of one thousand dollars, aggregating nearly two and a half millions of dollars, were issued by the State. All the bonds, which were issued after the passage, in 1866, of an act of the legislature, were declared to be secured, as stated in the act, by a mortgage of the stock of the North Carolina Railroad held by the State and already, in its entirety, pledged for the security of all the bonds which had been previously issued
*323 * in aid of the North Carolina Railroad. The stock, however, remained in possession of the State, but each of the bonds thereafter issued contained an endorsement that ten shares of stock of the North Carolina Railroad Company in the hands of the State were mortgaged as security for the payment of each of the bonds.

Presumably, as a result of the disastrous consequences of the civil war and the events which followed, the financial affairs of the State of North Carolina in 1879 were profoundly embarrassed. The State had not paid the interest as it accrued on the bonds issued in aid of the North Carolina Railroad. It had in effect paid no interest whatever on the bonds issued in favor of the Western North Carolina Railroad, and, indeed, had defaulted generally in the payment of the interest on its public debt. Statutes were passed by the State providing for an adjustment of its financial affairs, so as to rehabilitate its credit, in order that when the state debt was readjusted the State might, for the benefit of all its people and its creditors, be able to pay the interest on and provide for the principal of the public debt. The adjustment made was accepted by those holding the bonds issued in aid of the North Carolina Railroad and they waived a very large sum of unpaid interest and received new bonds, accompanied with a reiteration of the pledge of all the stock of the North Carolina Railroad owned by the State, which had always been held by the State as security for the pay-

ment of all the bonds of that issue. It is to be inferred from the record that the adjustment proposed was generally accepted by the other creditors of the State, and that as a consequence its fiscal affairs were placed upon a sound basis. Be this as it may, certain is it that the adjustment was accepted by the holders of a vast majority of the bonds issued in aid of the Western North Carolina Railroad, and that such holders surrendered their old bonds and took new bonds of the State for twenty-five per cent of the face value of their bonds, these new bonds not purporting to be secured by any mortgage of the stock of the North Carolina Railroad.

*324 In 1901, twenty-two years after the passage of the acts referred * to, and their acceptance as above stated, Simon Schafer and his brother, composing the firm of Schafer & Brothers, bankers and brokers in the city of New York, addressed a petition to the legislature of North Carolina. Therein it was recited that the parties named were the holders, in their own right and as trustees, of nearly two hundred and fifty thousand dollars of the bonds issued in aid of the Western North Carolina Railroad Company, attached to which were unpaid interest coupons for more than thirty years. The petitioners declared that these bonds were substantially all the bonds of the series then outstanding because the holders thereof had not accepted the arrangement of 1879. It was stated that such arrangements had been accepted by the vast majority of others who held such bonds by reason of the financial stress of the State at the time, and because those creditors knew that the stock of the North Carolina Railroad mortgaged to secure the bonds was of no avail for such purpose, since its value at the time of the adjustment was not adequate to pay the bonds issued in aid of the North Carolina Railroad, in favor of which it was first pledged. It was recited that the petitioners had not availed of the adjustment because they preferred waiting a restoration of the credit of the State, and trusted that the stock of the North Carolina Railroad might ultimately prove adequate to pay the bonds as reduced, issued in favor of the North Carolina Railroad, and the small amount of bonds which remained outstanding, as a result of the adjustment. It was declared that this had been accomplished; that in consequence of the reduced amount of the North Carolina Railroad bonds brought about by the adjustment, and the retirement thereby effected of all the bonds of the Western North Carolina Railroad except the small amount held or represented by the petitioners, the stock of the North Carolina Railroad held by the State, if sold, would be adequate to pay both series and leave a balance in favor of the State. Reciting that the petitioners and those they represented were aware that their claims against the State could not be judicially enforced either in the state or Federal courts, the prayer was that an appropriation might be made to pay their bonds in principal

*325 * and accumulated interest, or that in default an act be passed authorizing suit in the courts to enforce the mortgage lien asserted to exist on the stock of the North Carolina Railroad. The prayer of this petition was not granted.

Shortly following the failure to act favorably upon the petition just referred to, the act of the legislature of South Dakota, set out in the opinion of the court, was passed. It will be observed that, among other things, it empowered the governor to accept gifts made to the State of bonds or choses in action, and authorized the attorney general of the State, when such gifts were accepted, to bring suit in the name of the State to enforce payment of the same, and for that

purpose "to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation (italics mine) *out of the recoveries and collections in such suits and actions.*" Thereupon Simon Schafer addressed the letter to the Hon. Charles H. Burke, a member of Congress from South Dakota, which is reproduced in full in the opinion of the court. It suffices to say that by that letter ten of the bonds were given to the State of South Dakota, and it was especially mentioned that the gift was made because Schafer was aware that he could not sue the State of North Carolina, whilst the State of South Dakota could do so. The letter also contained the suggestion, presumably as an inducement to an acceptance by the State, that if the ten bonds were enforced by the State of South Dakota, other gifts of similar bonds might be made. The bonds were accepted by the governor of South Dakota, and the attorney general of that State thereupon filed the present bill. The parties defendant were the State of North Carolina, a person sued as representing all the holders of bonds issued in aid of the North Carolina Railroad and a person sued as representative of the holders of the outstanding bonds issued in aid of the Western North Carolina Railroad. The prayer of the bill was in substance for a decree against the State of North Carolina for the amount of the principal of the bonds and for more than thirty years' accrued interest; for an enforcement of the mortgage asserted to
*326 exist on the stock of * the North Carolina Railroad Company held by the State; for a decree declaring that the holders of the bonds issued in favor of the North Carolina Railroad Company had lost their prior lien upon the whole stock by reason of their acceptance of the compromise under the act of 1879, and the taking of new bonds by them in pursuance thereof. It was, however, prayed that in the event it should be found that the lien of such bondholders on the stock had not been waived, the stock be ordered sold free from all encumbrances to satisfy the claims of the respective lienholders thereon, and that distribution be made of the proceeds of the stock among them according to priority.

The State answered, challenging the jurisdiction of this court to entertain the bill, and also urging various defences on the merits.

The person joined as representing the bonds issued in aid of the North Carolina Railroad made no appearance. Charles Salter, who was made defendant as representative of the holders of the bonds issued in aid of the Western North Carolina Railroad, answered, substantially admitting all the allegations of the bill, but praying "that plaintiff's bill be dismissed with costs, unless the court shall decree that all the stock subject to the second mortgage be sold for the benefit of all the holders of said second mortgage bonds."

The court now decides that it has jurisdiction, because of the delegation, in the second section of the third article of the Constitution, of judicial power to the United States over "controversies between two or more States," and because of the grant to this court of original jurisdiction over cases in which a State shall be a party. Whilst conceding that if the holders of the bonds issued in aid of the North Carolina Railroad are necessary parties the jurisdiction would be ousted, it is held that such bondholders are not necessary parties, since there may be a sale to enforce complainant's rights of a portion of the stock held by the State of North Carolina, subject to the prior rights therein of the holders of such bonds. The decree which will be entered will, therefore, adjudge the

*327 State of North Carolina to be indebted to South Dakota in the * amount of the principal of the ten bonds, with more than thirty years' accrued interest. The decree will direct the sale of the stock in the North Carolina Railroad Company held by the State, subject to the prior pledge in favor of the holders of the bonds of the North Carolina Railroad. The question of a deficiency decree is reserved, in case, as a result of the sale, the debt decreed against the State should not be extinguished.

With this summary of the pleadings, the facts, and the decision of the court in mind, I shall now state the reasons which compel me to dissent, all of which may be embraced in the two following general propositions which I shall examine under separate headings: (A) The absolute want of power in the court to render a decree between the two States on the cause of action sued on; and (B) The want of power to render the decree which is now directed to be entered, because of the absence of essential parties whose presence would oust jurisdiction and the impotency to grant any relief whatever in the absence of such parties.

(A.)

The absolute want of power in the court to render a decree between the two States on the cause of action sued on.

First. The power of this court to award a decree against the State of North Carolina is based on the provision in the second section of the third article of the Constitution, extending the judicial power of the United States over "controversies between two or more States," and to the delegation to this court of original jurisdiction over such controversies. If the provisions in question were the only ones on the subject it might be more difficult to deny that the Federal judicial power embraced this controversy. Those provisions, however, do not stand alone, since they must be considered in connection with the Eleventh Amendment to the Constitution, providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of *328 another State, or by citizens or subjects of any foreign state." * The question which the case involves is not what in a generic sense may be considered a controversy between States, but whether the particular claim here asserted by the State of South Dakota is in any view such a controversy. It is also to be observed that the question is not whether a controversy between States may not rise from a debt originating as the result of a direct transaction between States, but is whether one State can acquire a claim asserted against another State by a citizen of that or of another State or an alien, and as a result sue upon it, and thereby create a controversy between States in a constitutional sense. Indeed, the question is narrower than this, since in this case the alleged debtor State had years before the transfer of the claim in question, while it was yet owned by individuals, declined to recognize the debt, and had refused payment thereof, as the result of a controversy between itself and its alleged creditors.

I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted

construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof. My mind cannot escape the conclusion that if, wherever an individual has a claim, whether in contract or tort, against a State, he may, by transferring it to another State, bring into play the judicial power of the United States to enforce such claim, then the prohibition contained in the Eleventh Amendment is a mere letter, without spirit and without force. This is said because no escape is seen from the conclusion if the application of the prohibition is to depend solely upon the willingness of the creditor of a State, whether citizen or alien, to transfer, and the docility or cupidity of another State in accepting such transfer, that the *329 * provision will have no efficacy whatever. And this becomes doubly cogent when the history of the Eleventh Amendment is considered and the purpose of its adoption is borne in mind.

It is familiar that the amendment was adopted because of the decision of this court in 1793, in *Chisholm* v. *Georgia,* 2 Dall. 419, holding that the grant of judicial power to the United States to determine controversies between a State and a citizen of another State vested authority to determine a controversy wherein a citizen of a State asserted a claim against another State. That the purpose of the amendment was to remove the possibility of the assertion of such a claim is aptly shown by the passage from the opinion of Mr. Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, as quoted in the opinion of the court in this case, saying (p. 406):

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures."

As the purpose of the amendment was to prohibit the enforcement of individual claims against the several States by means of the judicial power of the United States, and as the amendment was subsequent to the grant of judicial power made by the Constitution, the amendment qualified the whole grant of judicial power to the extent necessary to render it impossible by indirection to escape the operation of the avowed purpose which the people of the United States expressed in adopting the amendment. How, as declared by Chief Justice Marshall, could the adoption of the amendment have quieted the apprehensions concerning the right to enforce private claims against the States, if the power was left open after the amendment to do so, if only they were transferred to another State? It is also to be observed that the construction now given causes the *330 judicial power of the United States to embrace * claims not within even the reach of the ruling in *Chisholm* v. *Georgia,* for that case only decided that under the grant of power a citizen of one State might sue another State. But under the rule of construction, now announced, not only claims held by citizens of other States and aliens, but those held by a citizen of the State, become capable of enforcement, if only the holders of such claims, after the State has refused to

pay them, choose to sell or make gift thereof to another State found willing to become a party to a plan to evade a constitutional provision inserted for the protection of all the States.

Let me, *arguendo,* grant that a case may be conceived of where one provision of the Constitution can be so construed as to render nugatory another and applicable provision. Even such an impossible doctrine can have no relation to the case in hand. The decisions of this court, rendered since the Eleventh Amendment, have consistently held that that amendment embodied a principle of national public policy, whose enforcement may not be avoided by indirection or subterfuge. Ought this rule of public policy to be disregarded, by endowing every State with the power of speculating upon stale and unenforceable claims of individuals against other States, thus not only doing injustice, but also overthrowing the fiscal independence of every State, and destroying that harmony between them which it was the declared purpose of the Constitution to establish and cement? Such a departure from the provisions of the Eleventh Amendment, and the rule of national public policy which it embodies, may not be sustained by the assumption that it would be unduly curtailing the independence of the several States to deny them the right of enforcing, by the aid of the Federal judicial power, claims against other States acquired from private individuals. For this assumption would amount to this, that any and all of the States only enjoy the essential privilege of being free from coercion as to the claims of individuals, and have the power to manage their financial affairs at the mere pleasure of any of the other States. This is to say, that for the purpose of preserving the rights of the States, those rights must be destroyed.

*331 It is true that the greater number of cases decided by this * court concerning the right to enforce a private claim against a State concerned controversies where suit was brought by citizens of other States or aliens, who were therefore persons expressly within the terms of the Eleventh Amendment. An analysis of those cases, however, will show that they were decided, not upon the mere ground that the person who sued was within the Eleventh Amendment, but upon the broad proposition that, by the effect of that amendment, claims of private individuals could not be enforced against a State, and that in upholding this constitutional limitation the court would look at the real nature of the controversy, irrespective of the parties on the record. If it were found by doing so that in effect the consequence of the granting of the relief would be to enforce by the Federal judicial power the claim of a private individual against a State, such relief would be denied. I content myself with the reference in the margin to the leading cases of this character,[1] and come at once to consider the adjudications of this court rendered in two cases which directly related to the operation of the prohibitions of the Eleventh Amendment on the grant of judicial power to the United States

[1] *Hollingsworth* v. *Virginia,* (1798) 3 Dall. 378; *Osborn* v. *Bank,* (1824) 9 Wheat. 738, 849; *Briscoe* v. *Bank,* (1837) 11 Pet. 257, 321; *Louisiana* v. *Jumel,* (1883) 107 U. S. 711; *Poindexter* v. *Greenhow,* (1885) 114 U. S. 270, 286; *Marye* v. *Parsons,* (1885) 114 U. S. 325; *Hagood* v. *Southern,* (1886) 117 U. S. 52; *In re Ayers,* (1887) 123 U. S. 443, 504; *Christian* v. *Atlantic & N. C. R. R. Co.,* (1890) 133 U. S. 233, 243; *Louisiana ex rel N. Y. Guaranty & Indemnity Co.* v. *Steele,* (1890) 134 U. S. 230; *Pennoyer* v. *McConnaughy,* (1891) 140 U. S. 1; *In re Tyler,* (1893) 149 U. S. 164, 190; *Reagan* v. *Farmer's Loan & Trust Co.,* (1894) 154 U. S. 362, 388; *Scott* v. *Donald,* 1897) 165 U. S. 58; *Tindal* v. *Wesley,* (1897) 167 U. S. 204, 219; *Smyth* v. *Ames,* (1898) 169 U. S. 466, 518; *Fitts* v. *McGhee,* (1899) 172 U. S. 516, 524.

over controversies between States, and to two other cases which directly concerned the effect of the prohibitions of the Eleventh Amendment in suits brought by persons who were within the grant of the judicial power but were not embraced within the category of persons specifically referred to in the Eleventh Amendment.

The first two cases referred to are *New Hampshire* v. *Louisiana* and *New*
*332 *York* v. *Louisiana.* The opinion * of the court in both was delivered by Mr. Chief Justice Waite, and is reported (1883) in 108 U. S. 76. The suits were originally brought in this court. The complainants were, in the one case, the State of New Hampshire, and in the other the State of New York; the principal defendant in both cases being the State of Louisiana. The complainant States asserted the rights to enforce certain pecuniary claims against the State of Louisiana, as the holders of the naked legal title to certain coupons and bonds of the State of Louisiana, which, pursuant to legislative authority, by assignment, had been acquired from citizens of the respective States, for the purpose of collection for the benefit of such citizens. The defendant State challenged the jurisdiction of this court over the controversy. To sustain such jurisdiction it was pressed by the complainant that the bonds and coupons were negotiable instruments, of which the assignee States became the legal owners, and that as such they as a matter of law were the real parties in interest, whether the transfer was a complete sale or merely made for the purpose of collection for the benefit of the assignors. The court first considered the grant of judicial power to the United States prior to the adoption of the Eleventh Amendment and held that as such power, when originally conferred, as interpreted in *Chisholm* v. *Georgia,* embraced the right of a citizen of one State to enforce his claims by suit directly against another State, a State could not, as the holder of the legal title, champion for its citizens a right for the prosecution of which a particular remedy had been provided by the Constitution. Coming to generally consider the effect of the Eleventh Amendment as elucidated by the history connected with its adoption, it was decided that as that amendment had expressly taken away the right of a citizen of one State to sue another State, a State could not enforce a right the assertion of which in the courts was prohibited to the citizen himself. Noticing the contention that the grant of judicial power over controversies between States was but a substitute for the surrender to the national government which each State had made, of the power of prosecuting against another State, by force if necessary as a sovereign trustee for its citizens, the claims of such citizens,
*333 the * proposition was held not to be sustainable, under the Constitution of the United States. It was decided that the special remedy originally granted to the citizen himself "must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant." Having announced this doctrine, it was then, as an inevitable deduction from it decided that, as the Eleventh Amendment had taken away the special remedy originally provided by the Constitution, there was no other remedy whatever left. The opinion of the court concluded as follows (p. 91):

"The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued and, in our opinion, one State cannot create a controversy with another State, within the meaning of that

term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

To me it seems that this adjudication is conclusive of the question now here. It in the broadest way determined that the prohibitions of the Eleventh Amendment controlled the grant of judicial power as to controversies between the States so as to exclude the possibility of that grant vesting a State with authority in any form, directly or indirectly, to set at naught the Eleventh Amendment. The case was decided, not upon the particular nature of the title of the bonds and coupons asserted by the States of New Hampshire and New York, since it was conceded that, but for the Constitution, a title such as that propounded would have given rise to an adequate cause of action. The ruling of the court was that, as suits against a State upon the claims of private individuals were absolutely prohibited by the Eleventh Amendment, such character of
*334 claim could not be converted into a controversy between * States, and thus be made justiciable, since to do so would destroy the prohibition which the Eleventh Amendment embodied. I do not perceive, if one State may not engender a controversy between States, in the constitutional sense, in respect to claims arising out of dealings between a State and individuals, how it was competent for the State of South Dakota to create such a controversy by the acquisition of a claim of the class whose enforcement it was the purpose of the Eleventh Amendment to effectually prohibit. It is to be observed that in the cases referred to the court did not deny that a sovereign State, in virtue of its existence as such, would not have possessed the inherent power to prosecute against another State the claims of its citizens, and that such a prosecution by it would have constituted a controversy between States in the international significance of those words. But the court held that controversies between States, in the constitutional sense, did not embrace rights of that character, because of the prohibitions of the Eleventh Amendment, which operated upon the whole grant of judicial power, including, of course, such grant as to controversies between States.

The two other cases to which I have referred are *Hans* v. *Louisiana,* (1890) 134 U. S. 1, and *Smith* v. *Reeves,* (1900) 178 U. S. 436. In the first, the opinion of the court was delivered by Mr. Justice Bradley; in the second, by Mr. Justice Harlan. In *Hans* v. *Louisiana,* a suit was brought in the Circuit Court of the United States against the State of Louisiana by a citizen of that State, under the claim that the rights asserted arose under the Constitution and laws of the United States, and therefore were not within the Eleventh Amendment, since that amendment only prohibited suits against a State by a citizen of another State or by aliens. The argument was pressed that as the guarantees of the Constitution were all-abiding, it would be against public policy to deprive a citizen of the protection of the Constitution of the United States by bringing him within the spirit when he was not within the letter of the Eleventh Amendment. The court answered the contention in the broadest possible way. It held that the
*335 effect of the Eleventh Amendment was to qualify * to the extent of its prohibitions, the whole grant of judicial power, and, therefore, although a suit by a citizen of a State against a State to enforce assumed constitutional rights, was not within the letter of the amendment, it was within its spirit, and there was

no jurisdiction in the Federal courts over such controversy. In summing up its general conclusions the court said (p. 21):

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgments, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause."

Smith v. *Reeves* was an action brought in the Circuit Court of the United States by a corporation created under an act of Congress, against the treasurer of the State of California, to obtain redress concerning certain taxes. The defendant challenged the jurisdiction upon the ground that in effect the action was one against a State. This court, concluding that the State of California was the real party in interest, was led to consider whether a Federal court was thereby deprived of jurisdiction. The contention on the part of the plaintiff was that as a Federal corporation had a right to invoke, in virtue of the law of its creation, the jurisdiction of the Federal courts, the case was not controlled by the prohibitions of the Eleventh Amendment forbidding suits against a State by citizens of other States or aliens. The court, speaking through Mr. Justice
*336 * Harlan, again adversely disposed of the contention, saying (p. 446):

"If the Constitution be so interpreted it would follow that any corporation created by Congress may sue a State in a Circuit Court of the United States upon any cause of action, whatever its nature, if the value of the matter in dispute is sufficient to give jurisdiction. We cannot approve this interpretation."

After referring to the views expressed by Hamilton, Madison and Marshall, which were commented upon in *Hans* v. *Louisiana,* the court quoted approvingly the following passage from the opinion in *Hans* v. *Louisiana:*

"It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would

have been adopted by the States? The supposition that it would is almost an absurdity on its face."

The opinion concluded as follows (p. 449):

"It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States when brought against a State by private individuals or state corporations, and at the same time extend such power to suits of like character brought by Federal corporations against a State without its consent."

*337 * Here again I am unable to perceive any ground for taking the case in hand out of the rulings made in the cases just reviewed. The letter of the Eleventh Amendment was just as inapplicable to a suit by a citizen of a State against a State to enforce his constitutional rights and to a suit by a Federal corporation, suing in the Federal court by virtue of its creation, as it was to the grant of judicial power over controversies between States. But the prohibition of the Eleventh Amendment was held to apply, because that amendment was again construed as prohibiting the enforcement of claims by private individuals against States through the judicial power of the United States, without reference to the character of the person by whom the claim was asserted. In other words, the decision was that the operation of the Eleventh Amendment was to be determined, not by the formal party complainant on the record, but by the essential character and nature of the claim or right which was asserted. This being the decision, how consistently can the State of South Dakota be held to have power to give effect to a character of claim as to which the Eleventh Amendment declares the judicial power of the United States shall not extend.

Will not the accuracy of what I have just stated, as applied to this case, be demonstrated by putting the question which this court put in *Hans* v. *Louisiana* and approvingly reiterated in *Smith* v. *Reeves,* and giving it the answer which the court gave in those cases, changing, of course, the form of the question to meet the case now here. For this purpose, I repeat the question, placing, however, in brackets the changed mode of expression necessitated by the difference in the character of the parties complainant. "Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued" [upon private claims due to its own citizens or to aliens or citizens of other States, if only such claims were sold or otherwise disposed of long after the debtor State had refused to pay them, so as to thus secure their judicial enforcement] "can we imagine that the Eleventh Amendment would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

*338 * Nor do I think the previous decisions of this court, which are relied upon as establishing that the State of South Dakota may maintain this suit, have any such tendency. Of course, it is not by me denied that a dispute as to boundaries between two States is judicially cognizable as a controversy between States, and that such may also be the case where one State asserts property rights against another, provided always that the assertion of the particular right does not violate the prohibitions of the Eleventh Amendment. So, also, in my opinion, *United States* v. *North Carolina,* 136 U. S. 211, and *United States* v. *Texas,* 143 U. S. 621, instead of sustaining the view that the cause of action here asserted can be treated, despite the provisions of the Eleventh Amendment, as a controversy

between States, establish the contrary. In *United States* v. *North Carolina,* the United States sued the State of North Carolina concerning the interest on certain bonds. No objection was taken by North Carolina to the jurisdiction of the court, since that State voluntarily assented to a judicial determination of the issue involved. There was, and could have been, therefore, no question of jurisdiction, so far as the State of North Carolina was concerned. The only question of jurisdiction which could have arisen was whether a suit by the United States against a State was within the constitutional grant of judicial power. Although the court in its opinion in *United States* v. *North Carolina* did not refer to the subject of jurisdiction, it must be assumed that it was considered. This is shown by a remark concerning *United States* v. *North Carolina,* made by the court in the course of its opinion in *United States* v. *Texas,* to the following effect:

"It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against the State."

Those two cases, therefore, so far as jurisdiction is concerned, simply determined that the grant of judicial power concerning controversies between
*339 States, whilst not in letter, embracing * a suit brought by the United States against a State, in spirit and purpose did give jurisdiction of a suit of that character. The effect of these rulings, then, was but to cause a suit by the United States against a State to be within the meaning of controversies between States. In other words, in ascertaining the import of the grant of judicial power as to controversies between States, the court gave force to the spirit and purpose of the Constitution in order to include a suit by the United States against a State within the category of controversies between States. This was simply applying the same rule of construction to the grant of judicial power for the purpose of including the United States, which had been previously applied in *Hans* v. *Louisiana,* in *Smith* v. *Reeves,* and in all the other cases to which I have referred, in order to exclude jurisdiction over controversies, to entertain which would have been a violation of the spirit and purpose of the Eleventh Amendment. When *United States* v. *North Carolina* and *United States* v. *Texas* are considered, it seems to me clear that the decision now made not only is destructive of the inherent rights of the States as protected by the Eleventh Amendment, but also strips the government of the United States of its rights as a sovereign belonging to it under the Constitution. As under the decisions referred to a suit between the United States and a State is within the grant of judicial power over controversies between States, it must follow that a suit by a State against the United Sates is also of that character. Now, as the ruling is that such a controversy may include the claim of a private individual, if only such claim be transferred to a State, it follows that a suit by a State against the United States on a claim of that character is within the grant of judicial power. Thus it has come to pass that any and every claim against the United States, whatever be its character, is enforceable against the United States if only a State chooses to acquire and prosecute its enforcement. It is no answer to suggest that such claims of private individuals are not justiciable unless the law of the United States has caused them to be so, for if the constitutional grant of judicial power embraces such controversies

340 * as is now necessarily held, any restriction by Congress would be repugnant to the Constitution.

My reason does not perceive how the principles which have been stated and the rulings of this court enforcing them are rendered inapplicable by the suggestion that, as the court may not inquire into the motives actuating a particular transfer of right, therefore it is without power to refuse to enforce in behalf of South Dakota the alleged gift. This proceeds upon the assumption that the want of jurisdiction to enforce a private claim against a State depends upon motive. But the absence of such jurisdiction rests upon the constitutional prohibition which addresses itself to the very nature of the cause of action and imposes upon the court the duty to inquire into it. The power of the court when such is the case, even in a case brought in this court by one of the States of the Union to enforce an alleged pecuniary right, is aptly illustrated by *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265. There the State of Wisconsin, having obtained a judgment against the defendant corporation in the courts of Wisconsin, availed of the original jurisdiction of this court to sue the defendant corporation to enforce the judgment. It was held that, as the judgment was for a penalty imposed by the laws of Wisconsin, and as penalties had no extraterritorial operation, the court would look at the origin of the rights upon which the judgment was based, and, doing so, declined to enforce the judgment. See also *Andrews* v. *Andrews,* 188 U. S. 14. If, as the result of merely a general rule of law against the extraterritorial operation of statutory penalties, this court looked beyond the judgment sued on by a State to the cause of action merged in the judgment, and refused relief, the court now must have the power to look into the present cause of action and the origin of the rights asserted by the State of South Dakota. To do otherwise seems to me is but to declare that a general principle of law restricting the extraterritorial enforcement of penal statutes must be held to have more sanctity than the declared will of the people of the United States expressed in the Eleventh Amendment. Indeed, the existence of power in this court to inquire into purpose and motive in suits brought by one

*341 * State against another State was directly upheld in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana, supra.* It was not denied in those cases that the bonds sued upon were negotiable, and that if the rules of law controlling in controversies between private individuals were to be applied, the title of each plaintiff State to the bonds it sought recovery upon could not be gainsaid, but should be regarded as absolute. Coming, however, to enforce the provisions of the Eleventh Amendment, the court held that it was its duty to depart from the rule ordinarily applied and to examine into the nature of the asserted rights, and if to give effect thereto would be inconsistent with constitutional provisions, to refuse to lend its aid to the enforcement of the claims.

Second. But putting out of view what seem to be the controlling principles previously stated, let me now look at the controversy from a narrower point of view and consider the rights of the parties by those considerations which would apply to the enforcement of private rights. It is unquestioned on the record that the bonds given to the State of South Dakota and upon which its action is based were past due at the time of the gift, and that for more than twenty years prior to the gift the State of North Carolina had, by her legislation, held herself not bound to pay the same. That these facts were known to the State of South

Dakota when it accepted the gift is shown. The makers of the gift could not transfer to the State of South Dakota rights which they had not. In other words, if when the gift was made that which was parted with was not susceptible and had never been susceptible of legal enforcement because not embodying a justiciable obligation against the State of North Carolina, the State of South Dakota could not, by the acceptance of the gift, acquire greater rights than were possessed by the transferer. I take it to be the elementary rule of public law that, whilst the contracts of a sovereign may engender natural or moral obligations, and are in one sense property, they are yet obligations resting on the promise of the sovereign and possessing no other sanction than the good faith and honor of the sovereign itself. These principles, as applied to the States of
*342 * this Union, are the necessary resultant of the adoption of the Eleventh Amendment. It is not necessary to refer to opinions of publicists on the general subject, since this court—as to the States of the Union—has declared the doctrine so fully as to leave it no longer an open question in this forum.

The concluding passages already quoted from the opinion in *Hans* v. *Louisiana, supra,* approvingly referred to in *Smith v. Reeves,* state the subject in the clearest possible way. Prior to the cases just mentioned, however, this court in numerous decisions had announced the same doctrine. A few of the more important of those cases will now be briefly noticed. In *In re Ayers,* (1887) 123 U. S. 443, the court, speaking, through Mr. Justice Matthews, said (p. 504):

"It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans,* 102 U. S. 203. That obligation, by virtue of the provisions of article I, § 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas,* 20
*343 How. 527; *Railroad Co.* v. *Tennessee,* 101 U. S. 337. The very * object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial

tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

There is another and allied reason which seems to me equally decisive against this claim. As will be observed from the passage already quoted from the opinion of this court in *In re Ayers supra,* it was there affirmatively declared that as the obligation of a State rested but on its conceptions of moral duty, the State itself, under the great responsibilities which attach to it as a sovereign, was the ultimate tribunal to whom the creditor agreed at the very inception of the contract to submit his rights. And that where a sovereign State, in the discharge of the public duty thus resting upon it, declared against the payment of an obligation, such conclusion by the sovereign was a determination by the tribunal which had been impliedly agreed on and was binding upon the creditor, and, as a result of the Eleventh Amendment, not susceptible of review or change by the courts of the United States. Applying this doctrine to this case it is apparent that years before the transfer of the bonds to the State of South Dakota, the State of North Carolina had, through its duly constituted authorities, determined that the holder of the bonds in question had not the right now asserted by the State
*344 of South Dakota under the transfer from such * creditor. This after all only serves additionally to demonstrate the fallacy underlying the assumption that the State of South Dakota, because it is a State and may avail of the grant of judicial power over controversies between States, can in doing so escape the prohibition of the Eleventh Amendment, created for the very purpose of protecting the States and preserving their independent control over their own affairs. It seems to me the gross inequality which must arise from disregarding the judgment of the tribunal selected by the creditor is well illustrated by this case. When the facts which I have at the outset stated are recalled, it will be observed that there were about two and a half millions of dollars of outstanding bonds of the same series as those now owned by the State of South Dakota, and that that amount was reduced to about two hundred and fifty thousand dollars of principal, as a consequence of the conclusion of the State of North Carolina concerning the exigencies of its financial situation. It is also certain, when the facts stated in the petition presented to the legislature of North Carolina by the assignor of the State of South Dakota are recalled, that but for this vast reduction of the debt produced by the determination of the State of North Carolina, the alleged security now sought to be realized upon by the State of South Dakota would be of no value. The moral attitude shown by the record then is this, that the State of South Dakota, as the mere beneficiary of the bounty of an individual, seeks to derive all the benefit resulting from the judgment of the State of North Carolina as to its public debt and at the same time desires to repudiate that judgment, and to obtain rights which never would have been within its reach if the judgment of the State of North Carolina had not been exercised. Under these circumstances it to me seems, even if a court of equity was vested with power to disregard the final judgment of the tribunal selected at the time the bonds were issued, such court should not exercise that power in favor of one standing on the record in the position which the State of South Dakota here occupies.

Looking at the question from a yet narrower point of view, the same
*345 conclusion seems to me to be impelled. In *United * States* v. *Buford,* (1830) 3 Pet. 11, the question was considered whether a claim acquired by the government of the United States from an individual, which was barred by limitation at the time of its acquisition by the United States, was yet enforceable in the hands of the government. The court decided that, as against the United States, under such circumstances, despite the general exemption of the government from the operation of such statute, the bar of the statute was operative. The court said (p. 30):

"It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

And this principle was applied by the Court of Exchequer in *King* v. *Morrall,* 6 Price, 24, cited approvingly in *United States* v. *Nashville &c. R. Co.,* 118 U. S. 120. The facts of the case were, in brief, as follows: On a *scire facias* it was sought by the crown to recover from a creditor of a debtor to the crown the amount of a certain bill of exchange. On demurrer to a plea of the statute of limitations it was contended that the right of the crown was not barred by the statute—by a plea which in point of fact admitted the debt. The court held otherwise. Lord Chief Baron Richards observed (p. 28):

"The crown is only entitled to its debtor's right, and cannot create or revive any right in the person of its debtor, if none ever existed, or it has become extinct. In this case, nothing could have been recovered by the debtor of the crown against this defendant if the statute had been pleaded; I therefore consider that it is also a good bar to the suit of the crown, who stands precisely in the same situation as its debtor, and that this is an honest plea which therefore the law allows. If the crown could thus put its debtor in a better situation than he was in before, by such a proceeding as this, the consequence would be monstrous before the passing of the late statute, and the mischief would have been incalculable."

Wood, Baron, said (p. 29):

"In this case, the claim of the crown is only a derivative right, and it must, therefore, stand in the same situation as its principal."

*346 * Garrow, Baron, remarked (p. 31):

"By a process, said, by a fiction, to be for the benefit of the crown, it is attempted to revive the debt, and place the creditor in a better situation than the law permits. This is too gross an absurdity; . . . "

These authorities additionally demonstrate that a claim which, when acquired by the State of South Dakota, was without legal sanction, did not by the mere fact of such acquisition become a justiciable, enforceable right. It may be said that there was no statute of limitations in the State of North Carolina barring the claim. But this begs the whole question. It assumes that the State of North Carolina should have indulged in the idle ceremony of passing a special statute of limitations extinguishing, after the lapse of a certain time, a cause of action which had never existed. The proposition is but a further illustration of the misconception which results from holding that the claim of an individual against a State which is not enforceable can be made such by the voluntary act of transferring. The very attribute of sovereignty renders it unnecessary for the sovereign to legislate for its own behalf in the passage of statutes of limitations, in-

solvent and other like laws, as its will, controlled alone by the duty and sense of responsibility which sovereignty must be presumed to engender, determines the question of liability.

But let me analyze the proposition in order to see what it leads to. What is a statute of limitations? It is but the action of the State in determining that, after the lapse of a specified time, a claim shall not be legally enforceable. In this case, from the very inception of the alleged obligation to the time of the transfer to the State of South Dakota, there was no legal cause of action for the enforcement of the claim under the laws of North Carolina, and by the obligation of the Eleventh Amendment no cause of action on the subject could be asserted to exist in any court of the United States. To hold that there is a right to recover in this case which would not exist if there had been a statute of limitations barring the cause of action, although none had ever arisen, is but to
*347 say that the right of the parties is to be determined by words having * no significance whatever. The fact that the state of North Carolina, in her own courts, was not subject to be coerced as to the claim in question, was in effect a state statute of limitations, since the act of the State in forbidding the arising of a cause of action is certainly in reason the equivalent of an act of that State barring a cause of action in a case where one could exist. It is the non-existence of the cause of action at the time of the transfer, upon which rests the rule preventing a sovereign from recovering on a claim which was barred at the time it acquired it. This is true also of the Eleventh Amendment. As that amendment from the date of the inception of the alleged contract prohibited the assertion of any cause of action concerning the same in the courts of the United States, the amendment was substantially a national statute of limitations. Thus operating, it furnishes an effectual barrier, preventing the State of South Dakota from asserting in the courts of the United States that it had acquired from its transferrer a cause of action which the Constitution of the United States prevented from ever existing so far as the judicial power of the United States was concerned.

Nor does the fact that the State of South Dakota alleges there was a pledge or mortgage of certain stock in the North Carolina Railroad serve at all to take the case out of the control of the provisions of the Eleventh Amendment. It is not pretended that any delivery of stock alleged to have been pledged was ever made to the bondholders; on the contrary, it is conceded that the stock in question has always been in the possession of the State of North Carolina. The right to enforce the alleged pledge must therefore rest upon the power to enforce a private claim against the State of North Carolina and to take from its possession property of which it has ever had the absolute dominion and control. And this view is to my mind concluded by the previous rulings of this court, one of which I shall now particularly notice.

Christian v. *Atlantic & North Carolina Railroad,* (1890) 133 U. S. 233, was a bill in equity to reach dividends on the stock of the railroad company, and apply such dividends to the payment of bonds issued by the State of North Caro-
*348 lina, * and for a sale of stock owned and held by the State. It was contended by the defendants that the proceeding was in substance against the State, and therefore within the prohibitions of the Eleventh Amendment. The correctness of this contention was denied, on the ground that there was a valid contract in favor of the complainant; that by that contract there was a pledge in

its favor; and that the object of the suit was not to hold the State of North Carolina or to sue it, but to proceed *in rem* against the stock to enforce the right in and to it resulting from the contract. The court—not at all disputing that if the premise was correct the legal conclusion based on it was well founded—proceeded to test the accuracy of the premise. It found that the stock in question had never been actually delivered to the alleged pledgee, but had always remained in the possession of the agents of the State. Reaching this conclusion, it was held that there was no pledge unless such contract resulted from the declaration of the State that the stock held by it was pledged. Coming to consider that question, the court, speaking through Mr. Justice Bradley, said (p. 242):

"It was no more of a pledge than is made by a farmer when he pledges his growing crop or his stock of cattle for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular sense. His language may amount to a parol mortgage, if such a mortgage can be created; but that is all. So in this case, the pledge given by the State in a statute may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt. But how is that right to be asserted? If the mortgagor be a private person, the mortgagee may cite him into court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in such a proceeding. Even when absent, beyond the reach of process, he must still be made a party and at least constructively cited by
*349 publication or otherwise. This is established by the authorities before * referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign State, no such proceeding can be maintained. The mortgagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the 11th Amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Louisiana* v. *Jumel,* 107 U. S. 711; *Parsons* v. *Marye,* 114 U. S. 325; *Hagood* v. *Southern,* 117 U. S. 52; *In re Ayers,* 123 U. S. 443."

Applying the ruling made in the case just cited to the case in hand, it to me clearly results that as possession of the alleged pledged or mortgaged stock was never parted with by the State of North Carolina, the right asserted by the State of South Dakota to enforce the alleged pledge comes directly within the prohibition of the Eleventh Amendment, since in its essence it depends upon the existence in this court of the power to enforce against the State of North Carolina in favor of the State of South Dakota, a mere promise made by North Carolina to a private individual, as to which the State of South Dakota acquired no greater right than was possessed by the individual who made the transfer to it of the bonds in question.

Third. Finally, putting out of view the various considerations which I have

previously stated, in my opinion this record discloses a condition of things which ought to prevent a court of equity from exerting its powers to enforce for the benefit of the State of South Dakota the claim which it asserts against the State of North Carolina. From the facts which I have at the outset recited it is undeniable that at the time the gift was made to the State of South Dakota of the
*350 bonds in question * they were past due and payment thereof had been more than twenty years prior to the gift refused by the State of North Carolina. The letter evidencing the gift demonstrates that the purpose of the gift to the State of South Dakota, was to enable that State to assert a cause of action against the State of North Carolina which did not exist in favor of the transferrer. It also appears by the act of the legislature of South Dakota, under which this suit was brought, that the State of South Dakota deemed that it might acquire a mere right to litigate, since the act itself in advance provided that the attorney general of the State should prosecute actions in the name of the State to recover on bonds or choses in action which might be transferred to the State, and that it contemplated litigation without cost to itself, since the act empowered the attorney general to employ counsel to prosecute suits, the compensation to be paid *out of the proceeds which might be realized.* This condition of things, in my opinion, although it may not be champertous in the strict sense of that word is in its nature equivalent to a champertous engagement, whose enforcement is contrary to public policy, and one which a court therefore ought not to lend its aid to carry into effect. It has been sometimes said that the doctrine of maintenance and champerty has no application to the sovereign. But this can alone be justified by taking into view the high attributes which pertain to sovereignty. Now if the State of South Dakota may avail of the delegation of judicial power over controversies between States—a power conferred in view of the sovereign dignity of all the States—for the purpose of destroying the sovereignty of another State by subjecting such State to judicial coercion concerning a claim of a private individual, then it seems to me the State of South Dakota should be treated as any other private individual seeking to enforce a private claim, and should have applied to it by a court of equity the principles of morality and justice which control such courts in refusing aid to persons who acquire merely litigious and speculative claims. As said by this court, in the course of its opinion in *Randolph* v. *Quidnick Co.,* (1890) 135 U. S. 457: "It is a case where equity, true
*351 to its ideas of substantial * justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken." How aptly these observations apply to the case in hand is shown when it is considered that the holders of more than two million dollars of bonds of the same class as that held by the State of South Dakota, more than twenty years before the transfer to that State, accepted, on the faith of the operation of the Eleventh Amendment, and the circumstances surrounding the State of North Carolina at the time, the adjustment proposed by the act of 1879; and therefore that the claim of South Dakota now urged, in effect, as I have previously stated, seeks to avail of the result brought about by the operation of the Eleventh Amendment, and yet at the same time to deny its efficacy as regards the rights which it claims. It is additionally shown by the inference arising from the record that the whole fiscal system of the State of North Carolina in existence since the adjustment of 1879

has rested upon the action taken by the creditors of the State consequent upon their reliance upon the possession by the State of the attributes of sovereignty which it was the purpose of the Eleventh Amendment to consecrate.

But eliminating all the previous reasoning and considering the case upon the hypothesis that the controversy is one between States, nevertheless I am of opinion that the court is without jurisdiction. And the statement of the reasons which impel me to this conclusion involves an examination of the second proposition which was by me at the outset stated, that is—

(B.)

The want of power to render the decree which is now directed to be entered, because of the absence of essential parties whose presence would oust jurisdiction and the impotency to grant any relief whatever in the absence of such parties.

*352 Even under the view that the general conclusions of the * court as to its authority over the controversy as one between States is well founded, I cannot agree that the holders of the bonds issued in aid of the North Carolina Railroad are not essential parties to this controversy, since the nature of the relief specifically prayed necessitates their presence, and since, without such presence, in my opinion, no decree giving substantial relief to the complainant or doing justice to the principal defendant, can be rendered. If they are such essential parties, it is not questioned that the court is without jurisdiction. *California* v. *Southern Pacific Company,* 157 U. S. 229.

Under the assumption that there was a valid mortgage in favor of the complainant and other holders of the same class of bonds, the bill proceeds upon the theory that it is essential that it be determined what claim or right the holders of the bonds issued in aid of the North Carolina Railroad have upon or in the stock in question. To that end the bill challenged the existence of any right of pledge in favor of such bondholders, upon the theory that, as against the holders of bonds issued in aid of the Western North Carolina Railroad, they had lost their right by accepting the compromise of 1879. It is, however, further asserted in the bill that even if the holders of the bonds issued in aid of the North Carolina Railroad had not, by accepting the compromise of 1879, lost their rights as to the complainant and those similarly situated, yet as the pledge was past due when the adjustment of 1879 was entered into, it was essential, to afford the complainant relief as a junior secured creditor on the stock, that the entire stock be sold free from all encumbrances. And this was also the position taken by the answer filed on behalf of the representative of the outstanding bonds issued in aid of the Western North Carolina Railroad. The bill, then, having been framed upon the theory of the necessity of the specific relief referred to, which could not be afforded without the presence of the other lienholders, the cause, it seems to me, ought not now to be decided upon a wholly different theory, and relief, inconsistent with that specifically prayed for, be awarded to the complainant upon that changed basis.

*353 * But, leaving out of view the considerations just stated, it seems to me the decree which it is proposed to enter cannot afford any specific relief to the complainant, without destroying or materially impairing the rights of the prior lien-holders, although they are now held not to be essential parties to the controversy. The pledge in favor of the holders of the bonds issued in aid of the North

Carolina Railroad was of all the stock and for the benefit of all the bonds. It was therefore indivisible. It cannot be divided without impairing the obligations of the contract in favor of those creditors. Now, whilst each of the ten mortgages which it is in effect held the complainant possess purported to be of ten shares of stock securing each bond, no particular ten shares were delivered, segregated or identified. As a result no division of the stock held by the State had in fact ever been made, and, therefore, each and every one of the ten shares assumed to be mortgaged to secure each of the bonds were subject to the prior lien on all the stock in favor of all the holders of bonds issued in aid of the North Carolina Railroad. When the attempt is made to enforce the decree in this case what shares will be sold? If any particular shares, then, unless the rights of the prior lienholders are to be rendered divisible, although they are indivisible, the shares sold must continue to be subject to the entire pledge in favor of all the bonds issued in aid of the North Carolina Railroad. To state this situation, it seems to me, is to demonstrate that the decree will afford no substantial relief whatever. The best that can be said, under such circumstances, is that the effect of a sale so made will be merely to foment a law suit. A court of equity, when its aid is invoked to give particular relief, if it finds that it is unable to do it, ought not, whilst denying such relief, to enter a decree which confers no substantial relief, but, on the contrary, can only serve as a fruitful source of future litigation, injurious to the rights of the very party or class of persons in whose favor the decree is rendered. But this is not all, for whilst the decree will, in substance, deprive the complainant of any real benefit from his assumed security, a *354 sale under the decree must also result injuriously to the State * of North Carolina. Its rights, as well as those of the complainant, are entitled to consideration. The possibility of a deficiency decree is now taken into account in the opinion and rights on that subject are reserved. But if the sale which is to be ordered is one which must lead to a prejudicial result, then the effect of the decree is simply to order a sale which can produce at best no more than a nominal sum, and will lay a foundation for a deficiency decree for an amount wholly out of proportion to the actual value of the mortgaged property. It is to my mind no answer to point out that whilst there was no segregation and delivery of the ten shares of stock mortgaged to secure each bond, as such division was provided for, a court of equity will treat that as being done which should have been done. The fallacy of this lies in failing to consider the rights of the prior lienholders and overlooking the fact that their lien was indivisible, and that the segregation provided for in the act of 1866 could not be made without being subordinate to the entire sum of the prior and indivisible right of pledge. When this is borne in mind it results that the rights of those prior lienholders are necessarily clouded or impaired by decreeing that a court of equity will treat that as having been done which ought to have been done; when the very question is, could it have been done efficaciously, consistently with the rights of the prior lienholders? They are, therefore, I submit, essential parties, if it is proposed to give any real relief by the decree of sale which is ordered. If it is not proposed to give that character of relief, then such a decree ought not to be entered, especially when it does not accord with and in reality is inconsistent with the specific relief asked for.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE DAY concur in this dissent.

State of Missouri v. State of Nebraska.

State of Nebraska v. State of Missouri.

Supreme Court of the United States, 1904.

[196 *United States*, 23.]

Accretion is the gradual accumulation by alluvial formation and where a boundary river changes its course gradually the parties on either side hold by the same boundary—the center of the channel. Avulsion is the sudden and rapid change in the course and channel of a boundary river. It does not work any change in the boundary, which remains as it was in the center of the old channel although no water may be flowing therein. These principles apply alike whether the rivers be boundaries between private property or between States and Nations.

The boundary line between Missouri and Nebraska in the vicinity of Island Precinct is the center line of the original channel of the Missouri River as it was before the avulsion of 1867 and not the center line of the channel since that time, although no water is now flowing through the original channel.

Nothing in the acts of 1820 and 1836 relating to Missouri or the act admitting Nebraska into the Union indicates an intent on the part of Congress to alter the recognized rules of law fixing the rights of parties where a river changes its course by accretion or by avulsion.

THIS is a case of disputed boundary between two States of the Union.

The suit was commenced by an original bill filed in this court by the State of Missouri against the State of Nebraska. The relief sought by the former State is a decree declaring its right of possession of, and its jurisdiction and sovereignty over, certain territory east and north of the center of the main channel of the Missouri River as it runs between the two States at the present time; that Missouri be quieted in its title thereto; and that the State of Nebraska be forever enjoined and restrained from disturbing Missouri in the full enjoyment and possession of said territory.

*24 The State of Nebraska, after answering, filed a cross bill * asking a decree confirming the possession, jurisdiction and sovereignty of Nebraska over said territory; that the boundary line between that part of Missouri known as Atchison County and that part of Nebraska known as Nemaha County, be ascertained and established, and permanent monuments erected to indicate the location of such line; and that the State of Missouri be enjoined and restrained from disturbing the State of Nebraska in the full enjoyment and possession of said territory.

The commissioners heretofore appointed to take the evidence have filed their report, and it is agreed that their finding of facts is correct. The case is before us upon questions of law arising out of the pleadings, the report of the commissioners, and the stipulation of the parties.

By an act of Congress of March 6, 1820, provision was made for the admission of Missouri into the Union with the following boundary: "Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees north latitude; thence west, along that parallel of latitude, to the St. Francois River; thence up, and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude thirty-six degrees and thirty minutes;

thence west along the same, to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River, thence, from the point aforesaid north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east, from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines, to the mouth of the same, where it empties into the Mississippi River; thence, due east, to the middle of the main channel of the Mississippi River; thence
*25 down, and following the course * of the Mississippi River, in the middle of the main channel thereof, to the place of beginning: *Provided,* That said State shall ratify the boundaries aforesaid: (*a*) *And provided also,* That the said State shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said State, so far as the said rivers shall form a common boundary to the said State, and any other State or States, now or hereafter to be formed and bounded by the same, such rivers to be common to both; and that the river Mississippi, and the navigable rivers and waters leading to the same, shall be common highways, and forever free, as well to the inhabitants of the said State as to other citizens of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said State." 3 Stat. 545.

On January 15, 1831, the State of Missouri, speaking by its Legislature, memorialized Congress to make more certain and definite its northwest boundary. That memorial, among other things, stated: "When this State government was formed, the whole country on the west and north was one continued wilderness, inhabited by none but savages, and but little known to the people or to the Government of the United States. Its geography was unwritten, and none of our citizens possessed an accurate knowledge of its localities, except a few adventurous hunters and Indian traders. The western boundary of the State as indicated by the act of Congress of the sixth of March, eighteen hundred and twenty, and adopted by the Constitution of Missouri, is a 'meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River,' and extends from the parallel of latitude of 36 degrees and thirty minutes north, 'to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines.' The part of this line which lies *north of the Missouri River* has never been surveyed and established, and consequently its precise position and extent are unknown. It is believed, however, that it extends about one hundred miles north from the
*26 Missouri * River, and almost parallel with the course of the stream, so as to leave *between the line and the river a narrow strip of land,* varying in breadth from fifteen to thirty miles. This small strip of land was acquired by the United States from the Kansas Indians, by the treaty of the third of June, eighteen hundred and twenty-five, and is now unappropriated and at the free disposal of the General Government. . . . These considerations seem to us sufficiently obvious to impress upon the public mind the necessity of interposing, whenever it is possible, some visible boundary and natural barrier between the Indians and the whites. The Missouri River, bending as it does, beyond our northern

line, will afford the barrier against all the Indians on the southwest side of that river, by extending the north boundary of this State in a straight line westward, *until it strikes the Missouri, so as to include within this State the small district of country between that line and the river,* which we suppose is not more than sufficient to make two, or at most three, respectable counties. . . . In every view, then, we consider it expedient that the district of country in question should be annexed to and incorporated with the State of Missouri; and to that end we respectfully ask the consent of Congress. . . . With these views of the present condition and future importance of that little section of country, and seeing the impossibility of conveniently attaching it now or hereafter to any other State, your memorialists consider it highly desirable, and indeed necessary, that it should be annexed to and form a part of the State of Missouri. And to the accomplishment of that desirable end we respectfully request the assent of Congress."

A subsequent act, entitled "An act to extend the western boundary of the State of Missouri to the Missouri River," approved June 7, 1836, provided: "That when the Indian title to all the lands lying between the State of Missouri and the Missouri River shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the State of Missouri, and the western boundary of said
*27 State shall then be extended [to] the * Missouri River, reserving to the United States the original right of soil in said lands, and of disposing of the same: *Provided,* That this act shall not take effect until the President shall by proclamation, declare that the Indian title to said lands has been extinguished; nor shall it take effect until the State of Missouri shall have assented to the provisions of this act." 5 Stat. 34.

It is alleged in the bill that Congress intended by the act of 1836 to meet the wishes of Missouri as expressed in its memorial; that after the passage of that act the President, by proclamation, declared that the Indian title to the lands covered by that act had been extinguished; and that Missouri duly assented to its provisions.

By an act of Congress approved February 9, 1867, Nebraska was admitted into the Union, with the following boundary: "Commencing at a point formed by the intersection of the western boundary of the State of Missouri with the fortieth degree north latitude; extending thence due west along said fortieth degree north latitude to a point formed by its intersection with the twenty-fifth degree of longitude west from Washington; thence north along said twenty-fifth degree of longitude to a point formed by its intersection with the forty-first degree of north latitude; thence west along said forty-first degree of north latitude to a point formed by its intersection with the twenty-seventh degree of longitude west from Washington; thence north along said twenty-seventh degree of west longitude to a point formed by its intersection with the forty-third degree north latitude; thence east along said forty-third degree of north latitude to the Reya Paha River; thence down the middle of the channel of said river, with its meanderings, to its junction with the Niobrara River; thence down the middle of the channel of said Niobrara River, and following the meanderings thereof, to its junction with the Missouri River; thence down *the middle of the channel* of said Missouri River, and following the meanderings thereof, to the place of beginning." 14 Stat. 391; 13 Stat. 47.

*28 * *Mr. Edward C. Crow,* Attorney General of the State of Missouri, and *Mr. Sam B. Jefferies,* for the State of Missouri:

The only question here involved—that the central channel of Missouri River wherever it may at any time run is the boundary line between Missouri and Nebraska—is one of law. The contention of Missouri is that the central thread of the middle channel of the Missouri River is the dividing line between the States in question, and that this central thread constitutes at all times the proper line of division regardless of where it may run or be located.

The act of Congress, annexing Platte's Purchase to the jurisdiction of Missouri, construed in a practical way and in conformity with the legislative memorial of Missouri, approved June 15, 1831, unquestionably fixes the Missouri River as the boundary and brands it as the perpetual and natural monument without further description or further evidence.

There can be no question but that the Missouri River was designated as a natural monument by both the act of annexation and the memorial requesting the same. Being a natural monument, it must stand as ordained, for natural monuments are objects permanent in character, if they are found upon land as they were placed by nature, such as streams, lakes and ponds. 3 Washburn's Real Property, 5th ed., 435; Tiedeman on Real Property, 2d ed., § 831.

Where a river is made the boundary between jurisdictions, the middle of the river is considered the point or line of demarkation, or, in other words, the term "river" when used to designate a boundary between two jurisdictions, means, in law, the middle of the river. *Stanford* v. *Manin,* 30 Georgia, 355; *Hicks* v. *Coleman,* 85 Am. Dec. 103; *Lowell* v. *Robinson,* 33 Am. Dec. 673; *Hardin v. Jordan,* 140 U. S. 380.

It is not the meander line formed by what may be termed the water's margin, but the waters themselves which constitute the real boundary. *Railroad Co.* v. *Schurmer,* 7 Wall. 272; *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178; *Houck* v. *Yates,* 82 Illinois, 179; *Fuller* v. *Dauphin,* 124 Illinois, 542; *St.*
*29 * *Louis Bridge Co.* v. *People ex rel.,* 125 Illinois, 228; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535.

It has been said that a river is composed of the bed, banks and stream. *Eastman* v. *Water Company,* 43 Minnesota, 60. This, however, is not an exact statement of the true meaning of the term. A more apt way of putting it is that a river is composed of a stream of constantly and continuously flowing water, through a natural drainage basin, with the bed and banks as essential incidents to it. It is not the bed and banks which constitute the river, but the natural stream of water. When observed from the standpoint of the reason upon which the legislature of Missouri memorialized Congress to annex Platte's Purchase to Missouri and the act of Congress annexing the same, no other conclusion can be reached but that it was intended to make the stream the boundary line wherever that stream might at any time run.

The channel is the passageway between the banks through which the water of the stream flows. *Benjamin* v. *River Improvement Company,* 42 Michigan, 628.

The term "natural channel" includes not only all channels through which in the existing conditions of the country water naturally flows, but new channels through which it might afterwards flow. *Larrabe* v. *Cloverdale,* 131 California, 96.

The rule is settled that meander lines are not intended as boundaries, but that the body of the water will be regarded as the true boundary. *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178; *Mitchell* v. *Smith,* 140 U. S. 406; *Hardin* v. *Jordan,* 140 U. S. 371; *Clute* v. *Fisher,* 65 Michigan, 48; *Norwood* v. *Smith,* 59

Wisconsin, 344. This notwithstanding that in certain instances if a boundary river leaves its old channel and forms a new one, within the limits of either of the States which border on it, the old channel will remain the boundary. *Indiana* v. *Kentucky,* 136 U. S. 479; *Missouri* v. *Kentucky,* 11 Wall. 395; *Nebraska* v. *Iowa,* 143 U. S. 359, however, do not control as different principles and
*30 facts are involved. In this case * that territory known as Platte's Purchase, was annexed to Missouri by reason of a memorial coming from its legislative department in 1831, wherein certain important and substantial reasons were set out why the Missouri River, north of the mouth of the Kaw, should be fixed forever as an absolute boundary of Missouri. Soon afterwards this territory was annexed to the jurisdiction of the State. Congress had undoubted authority to annex the territory in the manner herein described. There can be no question but that it was the intention of the legislature of Missouri to make the request in the manner herein presented, because it was so shown clearly from the resolution.

As the annexation statute construed in the light of the memorial, shows the plain intention of Congress was to make the Missouri River wherever it might run the absolute boundary of the State, it matters not whether those conditions still exist which were considered in the memorial, and which authorized, warranted and induced Congress to so ordain. The conditions which moved Congress to enact the statute may have passed away. That, however, does not deprive the State of Missouri of the right to demand a strict compliance with the original grant as it was intended when made.

Missouri was admitted into the Union in 1820, long prior to the admission of Nebraska and during a time when all the territory immediately west of the Missouri River belonged to the Federal Government. At the time of its admission there was no practical assurance that the territory now known as Nebraska would ever be admitted into the Union. It belonged to the Federal Government to be disposed of at will, to be held as a territory or afterwards subdivided and admitted into the Union as a State.

By accepting the terms of the memorial annexing Platte's Purchase to the State of Missouri, the Federal Government made an absolute guarantee to the people of Missouri that the stream of water flowing from the Rockies, known as the Missouri River, should forever be its absolute boundary line.
*31 * Construed in the light of the memorial and according to the plain words of the statute of annexation, Missouri now claims that fixed and vested rights were obtained thereunder, and that she is entitled to complete jurisdiction and sovereignty over all the territory lying east of the Missouri River as hereinbefore stated, and that it was more important at the time of the annexation that this river be made the absolute boundary for all time to come than to afterward have such boundary changed by reason of sudden variation in the channel of the river. Indeed, had the fact in question been raised long prior to the admission of Nebraska into the Union, and after the annexation statute had been approved, no one would have questioned the right of Missouri to claim and obtain absolute sovereignty over the territory here involved. This principle is made manifest by reason of the terms of the statute construed in the light of the memorial and it fixes a vested privilege and right in the State of Missouri regardless of what might afterwards have been done by the Federal Congress without the consent of this complainant.

The rights and duties with respect to waters depends primarily upon the relations which the opposing parties bear towards each other. Farnham on Waters and Water Rights, 3.

In this controversy, there is no agreement or contractual relations existing

between the State of Nebraska and the State of Missouri, so far as the boundary line between the two States is concerned. Both States derive their power and rights in the premises from the Federal Government and Missouri, prior to the admission of Nebraska, being granted and delegated with sovereignty and power over the territory known as Platte's Purchase, and the Missouri River being at the time fixed as the absolute boundary line, is asking that the terms of the grant annexing the northwestern territory to it be strictly carried out. Congress unquestionably had authority to fix the Missouri River as it then and as it might subsequently run as the western boundary. When Nebraska was admitted
*32 into the Union, it came with both actual and constructive notice * that its jurisdiction could never extend to the east of the Missouri River south of the boundary line between Iowa and Missouri.

Mr. Frank N. Prout, Attorney General of the State of Nebraska, and *Mr. W. H. Kelligar,* for the State of Nebraska:

Where the course of a river forming the boundary between States is suddenly changed by avulsion, the boundary remains unchanged. The findings of the commissioners and the evidence adduced before them show that the Missouri River between Missouri and Nebraska changed its course in a single day—July 5, 1867—and left a large area of Nebraska land on the east side. This fact and the correctness of the findings of the commissioners are also established by stipulations of the parties.

The change having taken place in a single day, it is perfectly clear that no law applicable to accretion could have operated to transfer the territory in controversy from Nebraska to Missouri. The jurisdiction of those States and the status of the citizens do not fluctuate with every freak of the Missouri River. If they did, a large portion of the Nebraska population might go to bed at night in Nebraska and get up in the morning on the same spot in Missouri.

The rule applicable to the facts presented by the record has been stated by this court, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. *Iowa* v. *Nebraska,* 143 U. S. 361.

The boundary line between States does not change with a change in the channel of a river which had been the boundary. *Missouri* v. *Kentucky,* 11 Wall. 401; *Holbrook* v. *Moore,* 4 Nebraska, 437; *Collins* v. *State,* 3 Tex. Cr. App. 325; *Willey* v. *Lewis,* 28 Wkly. L. B. 104; Act of 1836, 5 Stat. 34.

*33 The act of 1836, 5 Stat. 34, merely extends the boundary * of the State of Missouri to the Missouri River upon extinguishment of the Indian title to the intervening land, and does not purport to change the rule of law that where the course of a river forming a boundary is suddenly changed by avulsion, the boundary remains unchanged. The act furnishes no foundation for complainant's argument that the shifting channel of the Missouri River, wherever it may be, whether changed by accretion or avulsion, is the eternal boundary line between Missouri and Nebraska. If the Missouri River should suddenly cut across the west end of Nebraska, complainant's theory would wipe Nebraska off the map and leave Missouri in possession of a vast empire acquired without regard to the rights of the inhabitants. No such conclusion is deducible from the enactment quoted.

But the argument of complainant seems to be that the act of Congress derived some additional significance from the legislative memorial of Missouri, in pursuance of which the statute was enacted. The memorial amounts to noth-

ing more than an argument in favor of the passage of the act. The intention of Congress is clearly expressed in the enactment and there is no occasion to resort to the memorial, either to ascertain the legislative will or to give effect to the statute.

Had Nebraska never been admitted into the Union, the State of Missouri would not now have jurisdiction of a crime committed on the land in dispute known as Island Precinct.

It is a rule of the courts, both state and Federal, that where the course of a river forming the boundary between States is suddenly changed by avulsion, the boundary remains unchanged.

MR. JUSTICE HARLAN, after making the foregoing statement, delivered the opinion of the court.

It is undisputed in the case that *prior* to July 5, 1867, the bed and channel of the Missouri River were substantially as they had been continuously
*34 from the date of the admission of * the respective States into the Union, only such variations occurring during that entire period as naturally followed in the course of time from one side of the river to the other. But on the day just named, July 5, 1867 (which was after the admission of Nebraska into the Union), within twenty-four hours and during a time of very high water, the river, which had for years passed around what is called McKissick's Island, cut a new channel across and through the narrow neck of land at the west end of Island Precinct (of which McKissick's Island formed a part), about a half mile wide, making for itself a new channel and passing through what was admittedly, at that time, territory of Nebraska. After that change the river ceased to run around McKissick's Island. In the course of a few years, after the new channel was thus made, the old channel dried up and became tillable land, valuable for agriculture purposes, whereby the old bed of the river was vacated about fifteen miles in length. This change in the bed or channel of the river became fixed and permanent; for, at the commencement of this suit it was the same as it was immediately after the change that occurred on the fifth day of July, 1867. The result was that the land between the channel of the river as it was prior to July 5, 1867, and the channel as it was after that date and is now, was thrown on the east side of the Missouri River; whereas, prior to that date it had been on the west side.

The fundamental question in the case is, whether the sudden and permanent change in the course and channel of the river occurring on the fifth day of July, 1867, worked a change in the boundary line between the two States.

The former decisions of this court relating to boundary lines between States seem to make this case easier of solution.

In *New Orleans* v. *United States,* 10 Pet. 662, 717, argued elaborately by eminent lawyers, Mr. Webster among the number, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations,
*35 * shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held

accountable for his gain." It was added—what is pertinent to the present case —that "this rule is no less just when applied to public, than to private rights." The subject was under consideration in *Missouri* v. *Kentucky,* 11 Wall. 395, and *Indiana* v. *Kentucky,* 136 U. S. 479. But it again came under consideration in *Nebraska* v. *Iowa,* 143 U. S. 359, 361, 367, 370. In the latter case, the court, after referring to the rule announced in *New Orleans* v. *United States,* and citing prior cases in which that rule had been recognized, said: "It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' 2 Bl. Com. 262; Angell on Water Courses, § 60; *Trustees of Hopkins' Academy* v. *Dickinson,* 9 Cush. 544; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535; *Hagan* v. *Campbell,* 8 Porter (Ala.), 9; *Murry* v. *Sermon,* 1 Hawks (N. C.), 56.

"These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect
*36 on boundary, but leaves it in the center * of the old channel." Again, in the same case, the court, referring to the very full examination of the authorities to be found in one of the opinions of Attorney General Cushing (8 Op. Atty. Gen'l, 175), said: "The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two States the varying center of the channel, and that avulsion would establish a fixed boundary, to wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River, on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in *Jeffries* v. *Land Company,* 134 U. S. 178, 189." In *Nebraska v. Iowa,* it appeared that the Missouri River near the land there in dispute had pursued a course in the nature of an ox-bow, but it suddenly cut through the neck of the bow and made for itself a new channel. The court said: "This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel."

Manifestly, these observations cover the present case and make it clear that the boundary line between Missouri and Nebraska in the vicinity of Island Precinct cannot be taken to be the middle of the channel of the Missouri River, as it has been since the avulsion of 1867 and now is, but must be taken to be the middle of the channel of the river as it was prior to such avulsion. We

cannot see that there are any facts or circumstances that withdraw the present case from the rule established in former adjudications.

Counsel for Missouri contend that the act admitting Missouri into the Union, the memorial sent by the Legislature of that State to Congress in 1831, and
*37 the act of June 7, 1836, with the * proclamation of the President as to the extinguishment of Indian titles to lands between Missouri, as originally bounded, and the Missouri River, show that Congress intended that, so far as the boundary of the State of Missouri was concerned, the middle of the channel of the Missouri River, wherever it may be at any particular time—and regardless of any changes, however caused or however extended, or permanent, suddenly occurring in its course or channel—was to be taken as a perpetual, natural monument fixing the boundary line. We cannot accept this view. We perceive no reason to believe that Congress intended, either by the acts of 1820 and 1836 relating to Missouri or the act admitting Nebraska into the Union, to alter the recognized rules of law which fix the rights of parties where a river changes its course by gradual, insensible accretions, or the rules that obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed. Missouri does not dispute the fact that when Nebraska was admitted into the Union the body of land described in the present record as Island Precinct was in Nebraska. It is equally clear that those lands did not cease to be within the limits of Nebraska by reason of the avulsion of July 5, 1867.

For the reason stated we adjudge, in respect of the matters involved in this suit, that the middle of the channel of the Missouri River, according to its course as it was prior to the avulsion of July 5, 1867, is the true boundary line between Missouri and Nebraska. Accordingly, the original bill must be dismissed, and a decree entered in favor of the State of Nebraska on its cross bill.

It appears from the record that about the year 1895 the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, made surveys of the abandoned bed of the Missouri River, in the locality here in question, ascertained the location of the original banks of the river on either side, and to some extent marked the middle of the old channel. If the two States
*38 agree upon these surveys and locations as correctly * marking the original banks of the river and the middle of the old channel, the court will, by decree, give effect to that agreement; or, if either State desires a new survey the court will order one to be made and cause monuments to be placed so as to permanently mark the boundary line between the two States. The disposition of the case by final decree is postponed for forty days, in order that the court may be advised as to the wishes of the parties in respect of these details.

State of Missouri v. State of Nebraska.
State of Nebraska v. State of Missouri.

Supreme Court of the United States, 1905.

[197 *United States*, 577]

Final Decree entered in accordance with opinion delivered December 19, 1904, reported in 196 U. S. 23, and stipulation of the parties.

THIS cause coming on for final decree, in pursuance of the opinion of this court filed herein on December 19, 1904, and the stipulation of the respective parties by their counsel filed herein on January 30, 1905, which said stipulation is in words and figures as follows, to wit:

"In the opinion of the court in the above-entitled cause, the order and finding of the court having been made as follows:

" 'It appears from the record that about the year 1898 the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, made surveys of the abandoned bed of the Missouri River, ascertained the location of the original banks on either side, and to some extent marked the middle of the old
*578 channel. If the two States will agree upon these surveys * and locations as correctly marking the original banks of the river and the middle of the old channel, the court will, by decree, give effect to that agreement; or, if either State desires a new survey, the court will order one to be made and will cause monuments to be placed so as to permanently mark the boundary lines between the two States. The disposition of the case by final decree is postponed for forty days, in order that the court may be advised as to the wishes of the parties in respect to these details.'

"In pursuance whereof now come the parties hereto by their respective counsel and agree that the said surveys made by the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, as reported by the Commissioners and set forth in the opinion of the court, constitute and be correct boundary lines between the said States, the same constituting the middle of the old channel of Missouri River as found by said court in its opinion.

"It is further agreed between the parties hereto that the monuments marking said boundary line established by the said county surveyors of said counties are not of a permanent character, and many of them have become destroyed or removed, and that in order to mark a permanent boundary line it is necessary and is deemed best that permanent monuments be erected at regular intervals on said line in such manner as will quiet all dispute in reference to said boundary.

"It is further agreed that said permanent monuments can be best established under the supervision of the Commissioners heretofore appointed by the court, to wit, Alfred Hazlett and John W. Halliburton, and it is therefore requested by the parties to this cause that the court, by a proper order, direct and require said Commissioners to establish or cause to be established under their direction such permanent monuments as may by them be deemed necessary in the premises and in accordance with the order of the court heretofore made, and make a report to the court of their acts and doings therein. In the

*579 execution of their powers herein said Commissioners * shall have authority to employ such surveyors and other assistants and procure such material as may be necessary in the establishment of the permanent monuments, marking said boundary line in accordance with the opinion of the court heretofore rendered and this agreement.

"It is further agreed that said Commissioners for their services herein shall receive such compensation as may be agreed upon by the respective parties, and if the parties are unable to agree, then such as may be fixed by the court after the services have been performed and due report thereon made.

"On account of the unfavorable condition of the weather during the winter months and of the character of the ground during the spring months, the parties hereto respectfully request the court that said Commissioners be granted until the first day of May, 1905, in which to make their report.

STATE OF MISSOURI, Complainant,
By EDWARD C. CROW,
Attorney General.
SAM B. JEFFRIES,
Assistant Attorney General.
STATE OF NEBRASKA, Defendant,
By F. N. PROUT,
Attorney General."

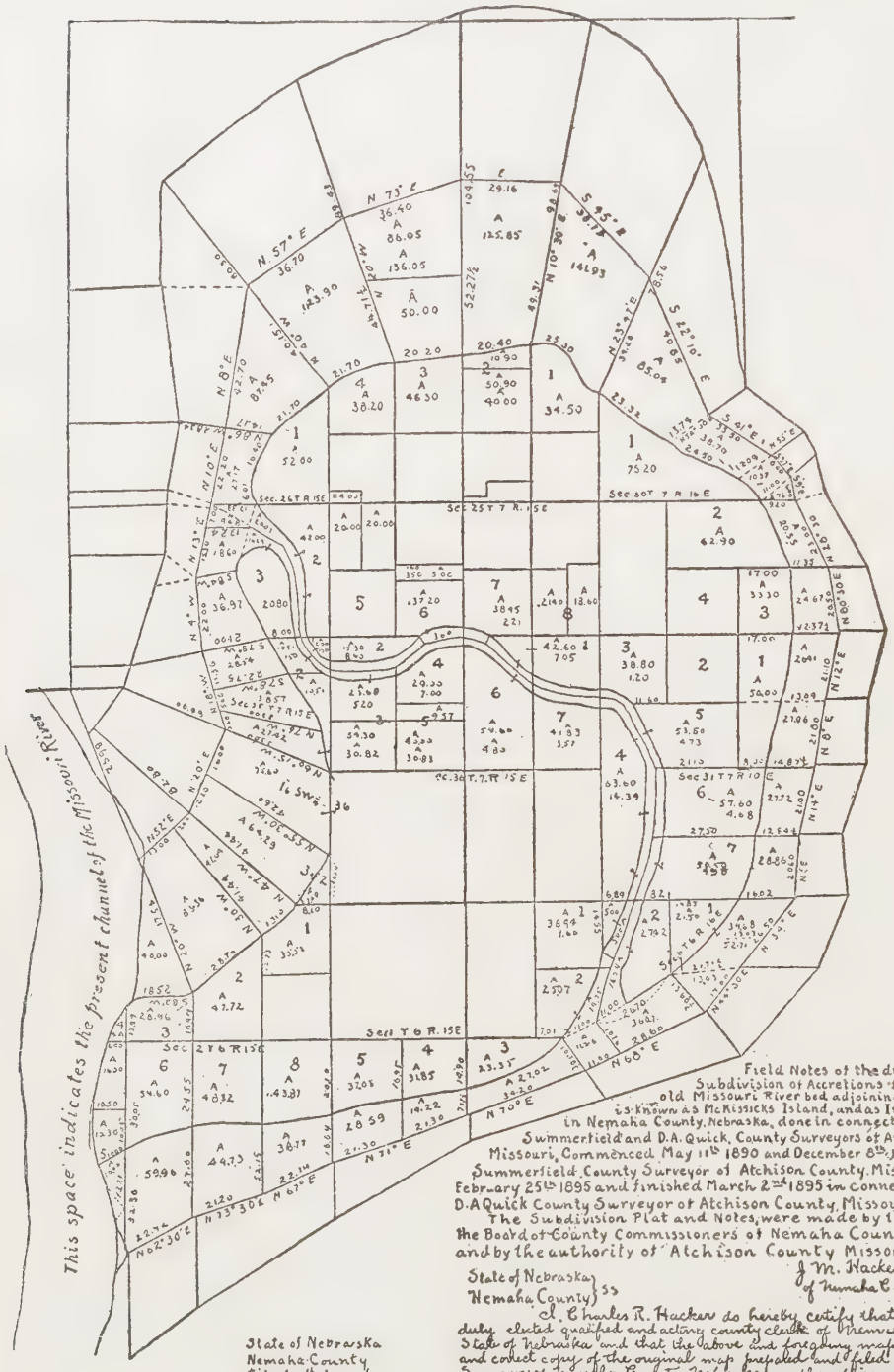
And on motion of Herbert S. Hadley, Attorney General of the State of Missouri, counsel for said complainant, that a decree be entered in this cause in accordance with said opinion and stipulation:

It is now here ordered, adjudged and decreed by this court that the middle of the channel of the Missouri River, according to its course as it was prior to the avulsion of July 5, 1867, is and shall be the true boundary line between Missouri and Nebraska, and that said boundary line is indicated upon and shown by the following plat:

*580 * And that said boundary line is more particularly shown and described by the following eleven sectional survey maps, with the field notes descriptive of each of said sectional maps and surveys:

MAP OF MCKISSICKS ISLANDS AND ACCRETIONS.

DEFENDANTS EXHIBIT D.


This space indicates the present channel of the Missouri River
Sec 25 T 7 R. 15 E
Sec 30 T 7 R 16 E
Sec 31 T 7 R 16 E
Sec 36 T. 7. R 15 E
Sec 1 T 6 R. 15 E
Sec 6 T 6 R 15 E
Sec 26 T 7 R 15 E
Sec 35 T 7 R 15 E
N 73° E
N 57° E
N 8° E
N 10° 30' E
S 45° E
S 22° 10' E
N 70° E
N 68° E
N 73° 30' E
N 67° E
N 62° 30' E
N 52° E
N 30° E
N 14° E
N 12° E
N 0° E
N 60° E
N 4° W
N 10° W
N 57° W
N 35° W
N 52° W
N 70° W
N 73° W
N 68° W
N 67° W
N 62° 30' W
N 52° 30' W
N 30° W
N 14° W
N 12° W
N 0° W
N 60° W
S 61° E
S 35° E
S 22° 30' E
S 14° E
S 12° E
S 0° E
S 60° E
S 68° E
S 73° E
S 67° E
S 62° 30' E
S 52° 30' E
S 30°

DEFENDANT'S EXHIBIT "E."

FIELD NOTES.

No. of Survey.....Date February 25th to March 29th 1895
Survey for Nemaha county Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker
Point established divis. of Accretions to Sec. 35, Twp. 7 N, Rng. 15 E, 6th P. M.

Commencing at the meander corner, on the Nebraska bank of the Old Missouri River bed where the Township line between Townships 6 and 7 North of Range 15 East of the 6th Principal Meridian in Nebraska intersects with the Old Missouri River bed and at a point 9.10 chains West of the South East corner of Section 35 and South West corner of Section 36 in Township 7 North, of Range 15 East of the 6th Principal Meridian in Nebraska, and run thence N 47° W at 40.00 chaines set a random stake for half way and at 82.88 chaines came to a meander corner on the Missouri bank of the Old Missouri river bed. This line run in connection with D. A. Quick Surveyor of Atchison county Missouri. Correcting back we corrected the random stake set at 40.00 chaines to 41.44 chaines for the half way or dividing line between Missouri and Nebraska and set a Limestone 7x12x25 inches square. Marked M. and N. Whole distence across 82.88 chaines. Half the distence across 41.44 chaines.

And Commencing at the quarter section corner on the West line of Section 36 and East line of Section 35 in Township 7 North, of Range 15 East of the 6th Principal Meridian in Nebraska, it being on the Nebraska bank of the
*581 Old Missouri * River bed and run thence N 67° W and at 32.52 chaines set at random stake for half way and at 66.00 chaines came out 88 links South of the corner on the Missouri bank of the Old Missouri River bed. This line was run in connection with D. A. Quick County Surveyor of Atchison county Missouri. Adjusting our bearing to N 66° 15′ W we corrected back and corrected the random stake set at 32.52 chaines to 33.00 chaines 48 links west and 44 links North of the random stake and on a direct line, and we set a Limestone 8x11x44 inches square for the dividing line between Missouri and Nebraska marked M and N

Whole distence across 66.00 chaines.

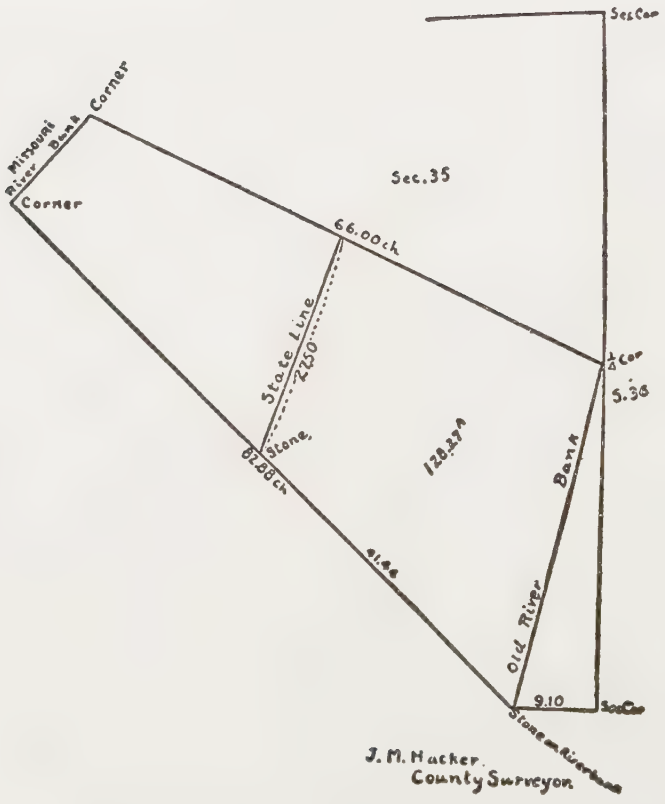
Half the distence across 33.00 chaines.

*582

SURVEYOR'S RECORD 224+

No 1 PLAT.

Section 35 in Township 7 North, Range 15 East 6th P.M. Nebr.



*583 * SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey.....Date May 15th to 20th 1890
Survey for J. B. Shields
At request of J. B. Shields
Chainmen sworn Marton Lamb and W. Barrenger
Point established corners to Lots 1 & 2 &c Sec. 35, Twp. 7, Rng. 15 E, 6th P. M.

Commenced at the North East corner of section 35 T 7 N of R 15 E and run thence South and at 6.58 chaines came to North Bank of old River Shute the SE. cor. of Lot 1 in Sec. 35, and at 4.20 chaines on South bank of Old River Shoot at the NE cor. of Lot 2 in Sec. 35 and at 40.00 chaines set a stone 6x6x12 inches square for the quarter Sec. corner on the East line of Sec. 35, the SE. cor. of Lot 2 in Sec. 35. And at 80.00 chaines set a stone 6x10x16 inches square for South East corner of Sec. 35, T 7 R 15 E Nemaha County Nebraska. Then commencing at the North East corner of Sec 35, T 7, R 15 E and running thence West 6.12 chaines to the East bank of old River Shute, the NW. cor. of Lot 1, in Sec. 35. Thence West 3.10 chaines to the West bank of old River Shute the NE. corner of Lot 2 in Sec. 35, thence West 8.00 chaines to the old bank of the Missouri River Set a Stone 6x8x10 inches square for the NW. cor. of Lot 2 in Sec. 35, and for the bank of the Old Missouri River in Nebraska.

Survey of the Accretion to Lot 2 in Sec. 35, T 7, R 15 E in Nebraska.

Commencing at a stone 6x8x10 inches square, set for the NW. cor. of Lot 2 in Sec 35, T 7, R 15 E. the Nebraska bank of the old Missouri River bed, and running thence S 78° 30′ W 42.00 chaines to the opposite bank of the old Missouri River bed in Missouri as designated by B. F. Rummerfield, County
*584 * Surveyor of Atchison County, Missouri. Then correcting and setting a stake 3 inches square at the half way point and for the NW. cor. of the Accretion to Lot 2 in Sec. 35, T 7, R 15 E in Nemaha Co. Neb. Said stake witnessed by a Cottonwood tree 9 inches in diameter beares N 49° 30′ W 24 links distant. And by a Cottonwood tree 11 inches in diameter beares N 19 E 32 links distant.

Then commencing at quarter section corner stone on the bank of the old Missouri River bead in Nebraska. Running thence N 67° W 65.05 chaines to the opposite bank of the old Missouri River bed on the Missouri State side of the old River bed. Then correcting and setting a stake & stone at 32.52½ chaines for the half way line and the South West corner of the Accretions to Lot 2 in Sec. 35 town. 7 Range 15 East in Nemaha County Nebraska.

*585

SURVEYOR'S RECORD 128

No 2. PLAT

Sec. 35, Township 7, Range 15 East 6th P.M.

*586 * SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey.....Date May 13th to 20th 1890
Survey for D. P. Holley and J. C. Roberts.
At request of D. P. Holley and J. C. Roberts.
Chainmen sworn Marton Lamb and W. Barrenger
Point established Lots 1, 2 & 3 &c. in Sec. 26, Twp. 7, Rng. 15 E. 6th P. M.

Commencing at the SE cor. of Sec. 26 T 7 R 15 E in Nemaha Co. Neb. and running thence North, at 20.00 chaines set a stake for East line of Lot 2 in Sec. 26, at 40.00 chaines found quartersection corner post at SE. cor. Lot 1 & NE cor of Lot 2 set by the Government, at 60.00 chaines set stake for East line of Lot 1 and at 73.90 chaines set stake for NE. cor. of Lot 1 and at bank of Missouri River in Nebraska. And from this line as a base we run lines West to find the old Missouri River bank on the Nebraska side, By First Commencing at the stake set at the 60.00 chaines North of SE. cor. of Sec. 26, Running thence West 16.50 chaines for bank of river setting a stake 3 inches square. Then commencing at the quarter section corner on the East line of Sec. 26. and running thence West 21.45 chaines setting stake 3 inches square for SW. cor. of Lot 1 in Sec 26 and NW cor to Lot 2 in Sec 26, which contains by Government Survey 52.70 Acres.

Then commencing at the stake 20.00 chaines North of the SE. cor. of Sec. 26, and on the East line of Lot 2 in Sec 26, and running thence West at 7.24 chaines, came to East bank of the River Shute the West line of Lot 2, Sec. 26, then at 11.34 chaines came to the West bank of the River Shute the East line of Lot 3 in Sec 26. Thence at 26.84 chaines set a stake for River bank and for the West line of Lot 3 in Sec 26.

Then commencing at the SE. corner of Sec 26 T 7 R 15 E in Nebraska,
*587 Running thence West and at 6.12 ch. came to * the East bank of the River Shute and the SW. cor. of Lot 2 in Sec. 26, Lot 2 contains 42.00 Acres and at 9.22 chains came to West bank of the River Shute and the SE corner of Lot 3 in Sec. 26, and at 17.22 chaines set a stone 6x8x10 in. sqr. for SW. cor. of Lot 3 on Old River line in Sec. 26, T 7 R 15 E. Lot 3 contains 30.80 Acres per Government survey of Accretions in Sec. 26 T 4 R 15 E in old River bed dividing the Accretions between Lots 1, 2 and 3 in Sec 26, T 7 R 15 E and Dividing between Nebraska and Missouri, and between the parties above named. Then commencing at a stone 6x8x10 inches square set for meander line and at SE cor. of Accretions to Lot 3 in Sec 26. And running thence S 78° 30′ West 42.00 chaines to the opposite Meander bank of Missouri River in Missouri as designated by B. F. Rummerfield County Surveyor of Atchison County Missouri. Then correcting back at 21.00 ch. set stake 3 inches sqr. for Division line and at the SW. cor. of Accretions to Lot 3 in Sec. 26. The Stake Witnessed by a Cottonwood tree 9 inches in diameter beares N 49° 30′ W 24 lks distant and by a Cottonwood 11 inches in *in* diameter beares N 19° E. 32 lks. distant.

Then commencing at the stake for the West line of Lot 3 in Sec 26, for the old River bank Running thence S 84° W 24.49 chaines to the opposite bank of the old Missouri River in Missouri as designated by B. F. Rummerfield County Surveyor of Atchison Co. Mo. Then at 12.24½ chaines set stake for division line on the West line of Lot 3 Sec 26, T 7 R 15 E between Mo. & Neb.

Then commencing at stake 3 inches square set for NW. cor. of Lot 2 and SW cor. of Lot 1 in Sec 26, and running thence N 87° W. 27.70 chaines to opposite Meander line of the Missouri River, in Missouri. Then at 13.85 chaines half way set a stone 6x6x12 inches square for SW. cor. Accretions to Lot 1 and NW. cor. of Accretions to Lot 2 in Sec 26, T. 7, R 15 E in Nebraska.

Then commencing at a stake 3 inches square set for the meander line of
*588 the old Missouri River on the West line of * lot in Sec 26. T 7. R 15 E. in Nebraska. Running thence N 81° W 28.34 chaines to the meander line on the Missouri side of the old Missouri River bead. Then setting a stake at 14.17 chaines for half way dividing line between Nebraska and Missouri.

Then commencing at a stake at the NE. corner of Lot 1 in Sec 26 T 7 R 15 E and at the intersection of the East line of Sec. 26 with the Missouri River in Nemaha County Nebraska. And running thence N 40° W 80.30 chaines to the meander line on the Atchison county Missouri side of the old Missouri River.

Then correcting and setting at 40.15 chaines the half way dividing point between Missouri and Nebraska a Limestone 3x12x18 inches square, for the NW. cor. of the Accretions in Missouri River belonging to Lot 1 in Sec. 26 Nemaha Co. Neb. Witnessed by a cottonwood tree 5 inches in diameter beares East 6½ lks. distant. And by a White Willow tree 5 inches in diameter beares West 5° S 9½ links distant

This survey made in connection with B. F. Rummerfield County Surveyor of Atchison county Missouri

Magnetic V 9° 30′ east.

*589

SURVEYORS RECORD 127
No 3
PLAT
Section 26 Township 7, Rang 15 East 6th P.M.
Missouri
State of Nebraska
to Lot 1 in Sec 26 in Missouri
81.5 A
D.P. Holley
Lot 1
52.70 A
D.P. Holley
Accretion
11.5 A
D.P. Holley
Missouri River
Old Missouri River Bed in the State of Missouri
Nebraska end
River Bed
Missouri Bank of the Missouri River
Old Missouri
Lot 2
42.00A
Lot 3
30.80
J.C. Roberts
Old Meandering
Stone Gedrin
J.M. Hacker
County Surveyor

*590 * SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey.....Date May 16th to 20th 1890
Survey for D. P. Holley and J. Henderson
At request of D. P. Holley and J. Henderson
Chainmen sworn Marton Lamb and W. Barrenger
Point established Accretions to Lots 3 & 4 Sec. 25, Twp. 7, Rng. 15 E, 6th P. M.

Commenced the survey of the Accreations to Lots 3 and 4 of Sec. 25 Town 7 North of Range 15 East, by Commencing at the Meander corner, at intersection of the half section line, running North and South threw section Twenty-five Town seven Range Fifteen East, with the Missouri River and at the Northeast corner of Lot No. 3, marked by a Bur Oak stake 4x4x36 inches square and by a peace of an iron bar drove in by the side of the stake.

Running thence North 102.88 chaines to the meander line on the opposite bank of the Missouri River as designated by B. F. Rummerfield County Surveyor of Atchison County Mo.

Then correcting back making corner on dividing line between Nebraska and Missouri at 51.44 chains at a stone set by the Atchison County Missouri Surveyor and Chainmen. And at 12.70 chaines north of the meander corner at the Northeast corner of Lot No 3 in Sec 25 set a stone for the NE. cor. of Twenty-eight acres off of the South end of the Acretians to Lot No. 3, of Sec 25. Then commencing at the NW. cor. of Lot 3, Sec. 25, running thence N 20° W 89.43 chaines to meander line on opposite bank of the Missouri River in Atchison County Mo. as designated by the County Surveyor of Atchison County Missouri B. F. Rummerfield. Then correcting back and setting a limestone 8x9x14 inches square at 44.71½ ch for the NW. cor. of Acreations to Lot No. 3
*591 * in Sec. 25. T 7. R 15 East in Nebraska and on the dividing line between Nebraska and Missouri Said stone is Witnessed by a Willow tree 9 inches in diameter bears N 63° 30′ W 54 lks distant And setting a stone 12.70 ch. North of NW. cor. lot 3, S 25, for NW. cor. of 28.00 acres off of South end of Acreations in Missouri River to Lot No. 3, Sec 25, T 7 R 15 E.

Then commencing at the intersection of the West line of Section 25 Town 7 North of Range 15 E, with the Missouri River. in Nebraska, at the meander corner at the North West corner of Lot No 4 in Sec 25, running thence N 40° W 80.30 chaines to the meander line of the opposite bank of the Missouri River in Missouri as designated by the County Surveyor of Atchison County Missouri B. F. Rummerfield. Then correcting back and at 40.15 chaines, the half way point, set a Limestone 3x12x18 inches square. Witnesses by a Cottonwood tree 5 inches in diameter, Beares East 6½ links distent. And also by a White Willow tree 5 inches in diameter Beares W 5° South 9½ links distent. This stone marks the North West corner of the Acretion in the Missouri River to Lot Number Four 4 in Section 25 Town 7 North of Range 15 East, in Nebraska, Nemaha County.

*592

SURVEYOR'S RECORD 126

No 4 PLAT.

Section 25, Township 7 Range 15 East 6th P M.

Old Missouri River channel in Missouri
Dividing line between Nebraska & Missouri
Stone 8 2 9 X 14
Old Missouri River channel in Nebraska
Stone 2 X 15 X 18
Accretion to Lot 3 Sec 25
136.05 A
28.00
108.05
to D. P. Holley
Accretion to Lot 4 Sec 25
D P. Holley
Stone
J. Henderson
28A bend of Accretion to Lot 3
Stone 3 X 12 X 18
D. P. Holley
Lot 4
J. Henderson
Lot 3
46.30A
Stone
Stone
Stone

*593 * SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey.....Date December 8th to 23d 1891
Survey for The Lombard Investment Co.
At request of J. H. Stewart 512 Exchange B'ld'g. Kansas City Mo.
Chainmen sworn Henry C. Taylor and Robert Taylor
Point established Accretions to Lots 1 & 2 Sec. 25, Twp. 7, Rng. 15 E 6th P. M.

Began the survey by commencing at the quartersection corner on the East line of section 25 Town 7 Range 15 East where we found the old government stake standing and for the purpose of preserving the corner we set a Limestone 4x9x16 inches square marked ¼, in the ground by the side of the old stake—Running from thence North to find the Meander corner at the NE. cor of Lot No. 1 in Sec. 25 and at 20.00 chains found a stone heretofore set at the SE. cor. of Lot 1, and at 32.00 chains set a random stake for the Meander corner on the bank of the old Missouri River at the NE. cor. of Lot. No. 1

Then commencing at a stone set for the center of Sec 25, T 7 R 15 E, and at 20.00 cha. found a stake heretofore set and at 40.00 chaines found an iron bar heretofore set the NW. cor. of 40. acres off of the South end of Lot 2, in Sec. 25, and set a limestone 6x12x15 inches square in by the side of the Iron bar, and at 43.40 chains found an oak post heretofore set for the meander Corner at the NE. cor. of Lot 3 in Sec 25-7-15 and by the side of the oak post we set a limestone 3x9x18 inches square for the NW. Meander cor. of Lot 2 in Sec. 25-7-15 E.—Witnessed by a Sycamore tree 12 inches in diameter beares S 75° 30′ W. 44 links distant And by a Sycamore tree ten inches in diameter. Bears S 35° E. 53 lks. distant. And also Witnessed by a Cottonwood tree 20 inches in diameter Beares N 31° 30′ W. 69 lks distant Then commencing at a stone
*594 * heretofore set for the NE. cor. of 40 acres off of the South end of Lot 2 in S 25, and run thence North 7.50 chains and set a random stake for the NE. Meander cor. to lots 1 & 2 in Sec 25. Then after testing the Meander random stake set at the NE. corners of Lots 1 & 2 of Sec. 25.-7-15 E. At the NE. Meander cor of Lot 1 we set a Blue Limestone 1½x12x12 inches square—Witnessed by a cottonwood tree 13 inches in diameter Beares 63° W 16 lks distant, And by a Sycamore tree 9 inches in diameter, Beares N 61° 30′ E. 53 lks distent. And at the NE. Meander cor. of Lot 2 & NW. cor of Lot 1 we set a Blue Limestone 3x15x18 inches sqr. Witnessed by a cluster of Willows Beares S 57° 30′ W. 33 lks. distant. Then commencing at the NW. cor. of Lot 2 in Sec. 25.7-15 E and run thence North at 52.00 ch. set a random stake for half way point across the old Missouri river bead, at 104.55 chains came to the North bank of the old Missouri river bed 2.57 ch. West of a Meander stake at the intersection of a Sec. line with the river, set by Rummerfield, making a jog of 2.57 ch. between ½ Sec & Sec lines in the diferent states, Then correcting back and at 27½ lks. North of the random stake set at 52.00 chains. Setting a Limestone 5x11x20

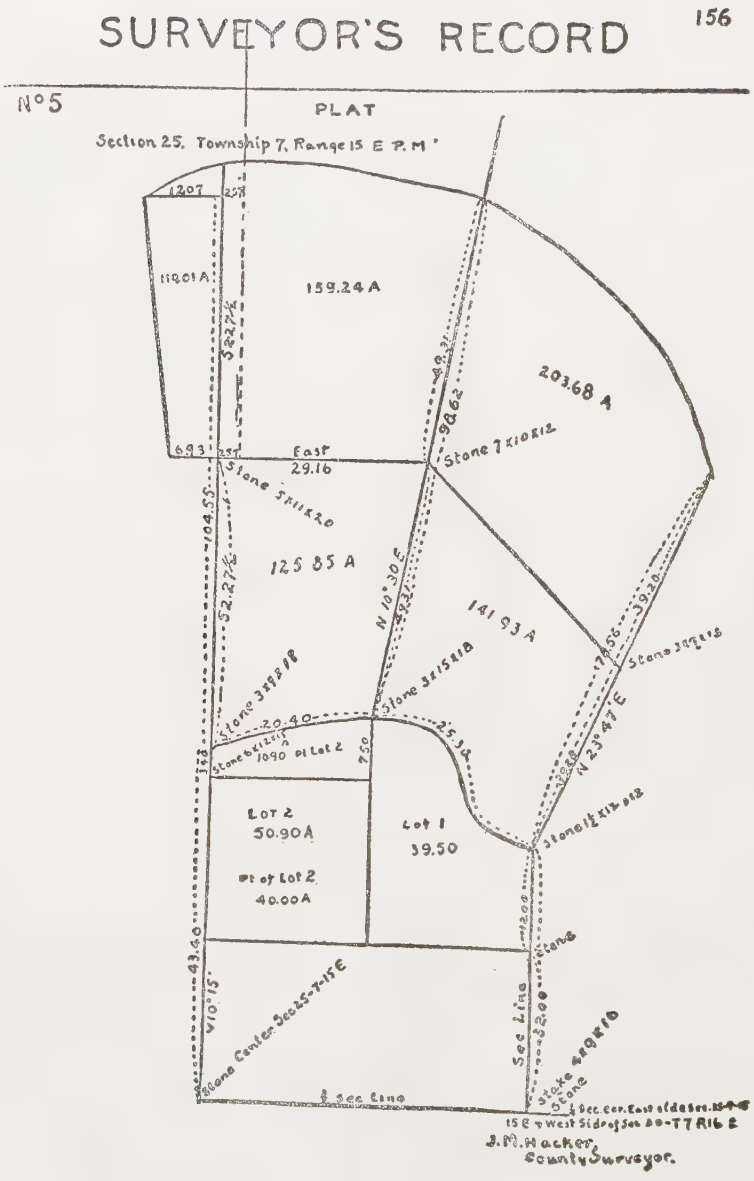
inches square for the NW. cor. of the accretions in the old Missouri river bed to Lot 2 in Sec 25 T 7 R 15 E.

Then commencing at the NE. cor of Lot 2 & the NW. cor. of Lot 1 in Sec 25, running thence N 10° 30′ E at 50.00 chaines set a random stake for ½ way and at 98.62 chains came to a stone at Meander corner on the North bank of the Mo. River set by Rummerfield for North bank of river. Then correcting back at 49.31 chains the half way point from NE. cor. of Lot 2 in Sec. 25-7-15 E. on the South bank of old Missouri river, to the meander corner on the opposite bank of the old Missouri river to a stone by Rummerfield for Meander corner on old Mo. River bank in the State of Mo. Setting a limestone 7x10x12 inches sqr at the NE. corner of accretion to Lot 2 in Sec 25.-7-15 in Nebraska. And NW. cor. of Lot 1 in Sec 25.

*595 Then commencing at the NE. cor. of Lot 1 in Sec. 25-7-15 E * Neb running thence N 23° 47′ E at 40.00 chaines set at random stake and at 78.56 chaines came to meader corner set by Rummerfield for north bank of old Missouri river. Then correcting back and correcting random stake set at 40.00 chaines by setting a limestone 3x9x13 inches square at 39.28 chaines the half way point. Being the NE. cor. of the accretion to Lot 1 in Sec 25 T 7 R 15 E. on the State line. The stone Witnessed by a cottonwood tree 6 inches in diameter. Beares N. 37° E 70 links distant

This survey made in connection with B. F. Rummerfield County Surveyor of Atchison county Missouri

*596


SURVEYOR'S RECORD
156
No 5
PLAT
Section 25, Township 7, Range 15 E P.M.
1207
25
118.01 A
159.24 A
203.68 A
693
25
East
29.16
Stone
Stone
125.85 A
141.93 A
Stone
Stone
Stone
Stone
20.40
Stone
1090
Pt Lot 2
Lot 2
50.90 A
Pt of Lot 2
40.00 A
Lot 1
39.50
Stone
Stone
Sec Line
Stone
Stone
Sec Line
J.M. Hacker,
County Surveyor.

*597 * FIELD NOTES.

No. of Survey.....Date December 8th to 23d 1891
Survey for The Lombard Investment Co.
At request of J. H. Stewart
Chainmen sworn Henry C. Taylor and Robert Taylor
Point established Accretion to Lot 1 Sec. 30, Twp. 7, Rng. 16 E, 6th P. M.

Commencing at quartersection corner on the West Line of Sec. 30, Town 7 North of Range 16 East. (By the side of the stake set by the Government Surveyors I set a limestone 4x9x16 to preserve and perpetuate the qr. sec. corner on the West line of Sec. 30 T 7 R 16 E.) And run thence East on the half section line at 20.00 chaines set a stake, at 40.00 chaines set a random stake and at 47.60 chaines set random stake for the meander corner on the bank of the Old Missouri river bed and the SE. cor. of Lot 1 in S 30 T 7 R 16 E. At the SE. cor. of Lot 1 in Sec. 30 T 7 R 16 E set a limestone 2x11x17 inches square for Meander cor. on the Old Missouri river bed- Then correcting back on half section line and at 20.00 chains set a limestone 4x8x16 inches square, Witnessed by a White elm tree 21 inches in diameter. Beares N 49½° E 17½ lks. distent. Then commencing at the Meander corner stone set at the NE. corner of Lot 1 in S 25 T 7 R 15 E. and also the NW. corner of Lot 1 in Sec 30 T 7 R 16 E. (see page 156 for sise of stone & Witness tree) running thence S 59° 30′ E 23.10 chaines for Meander corner set a limestone 2x12x14 inches square for meander corner on river bank. Witnessed by a cottonwood tree 14 inches in diameter Beares S 54° 30′ E-1.47 chaines distant. Then run S 55° E- 24.33 chaines for meander corner on bank of old Missouri river bed, and set a limestone 4x9x19 for meander corner.

Then commencing at the Meander corner at the NW. cor. of Lot 1 Sec. 30 T 7 R 16 E and run thence N 23° 47′ E for the meander corner on the oppo-
*598 site side of the old Missouri river * for the purpose of dividing the accretions and obtaining the amount belonging to Lot 1 Sec. 30 T 7 R 16 E. at 40.00 chaines set a random stake for half way, at 78.56 chaines came to the meander corner stone set by Rummerfield on Meander river line Then correcting back at halfway random stake corrected and at 39.29 chaines half way set a Limestone 3x9x13 inches square. Witnessed by a cottonwood tree 6 inches in diameter N 37° E 70 links distant. Then commencing at meander corner stone No 4 and run N 54° 30′ E at 12.00 chaines set a random stake at 27.49 chaines came to random corner set by Rummerfield at SE. cor Lot 1 Se 9 T 66 R 42 W in Missouri, Then correcting back at half way at 13.75 chaines set a stone 3x10x13 inches square Witnessed by a cottonwood tree 6 inches in diameter. Beares S 14° 30′ E 67 links distent.

Then commencing at meander corner stone No. 5 and run N 55° E at 10.00 chaines set a random stake for half way at 24.14 chaines came to random corner set by Rummerfield. Then correcting back at 12.07 chaines set a stone for the NE. corner of a part of accretions to Lot 1 in Sec. 30-7-16 E 12.07 chaines N 55° E from a limestone 4x9x19 inches square on meander bank of the old Missouri river on North line of lot 1 S 30-7-16 E Then commencing at a stone

2x11x17 inches square set at SE meander corner of Lot No 1 Sec 30-7-16 E and Run N 48° E at 10.00 chaines set a random stake for half way across the old river bed and at 22.88 chaines found it to be the distance across the river. Then correcting back moved random stake set at 10.00 ch by setting a stone at 11.44 chaines for the NE. cor of accretions to Lot 1, Sec 30-7-16 E. Then from the 2x11x17 inches square set for the SE. cor. of Lot 1 S 30-7-16 E. run east at 9.20 chaines set a stone for half way across the old bed of the Missouri river, and at 14.28 chaines set a random stake on the East bank of the Nishney-boteny River which river is in the old Missouri river bed, 4.12 chaines West of the East bank of the old Missouri River bed. At which point the half section line running East & West threw * Sec 30 T 7 R 16 E in Nebraska Jogs South 1.94 chaines of an 80 rod line running E & W threw the Section opposite and in Missouri State and 80 rods North of the South line of said sec. in Mo.

*599

*600

SURVEYOR'S RECORD 157

No 6 PLAT.

Section 30 Township 7 Range 16 East of 6th P.M. Neb

*601 * The division of the accretions from the North East corner of lot 2 and the SE. corner of Lot 1 in Section 30 Town 7 North, of Range 16 East of the 6th P. M. in Nebraska. Was made in connection with B. F. Rummerfield, Surveyor of Atchison county Missouri in December 1891. Run East and at 9.20 chaines set a stone for the dividing line and was 1.94 chaines South of Rummerfield's line

Whole distence across 18.40 chaines. Half the distince across 9.20 chaines.

V 9° 30′ E

FIELD NOTES.

No. of Survey.....Date From February 25th to March 29th 1895
Survey for Nemaha County Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker
Point established Divis. Accretions in Old River Sec. 30, Twp. 7 N, Rng. 16 E, 6th P. M. Neb

Commencing at the meander corner on the Nebraska bank of the Old Mo. River bed at the intersection of the South Line of S. 30, T 7, N.R 16 E. 6th P. M. in Nebr. with the Old Mo. River bed, it *it* being the S E. cor. of Lot 3 in S 30, and the N E. cor. of Lot 1 in S 31. And run East to meet D. A. Quick Surveyor of Atchison county Mo. Running from the Mo. side of the Old Mo. River bed on a division of Accretions therein and at 13.32½ ch. set a stake and came out 1.53 ch. apart he N and me S. and at half the difference between us 76½ lks. we set a Limestone 5x14x25 in. sqr. for the dividing line between Mo. and Neb. Whole distence across 26.65 chains. Half the distence across 13.32½ chaines. And Commencing at the meander corner on the Nebr. bank of the Old Mo. River bed, at the S E. cor. of Lot 2 and the N East cor. of Lot 3 in S 30 T 7 N R 16 E 6th P. M. in Nebr. And run East to meet D. A. Quick Surveyor of Atchison county Mo. running from the Mo. side of the Old Mo.

*602 River bed on a division of Accretions therein * and at 11.35 chaines set a stake and came out 2.00 chaines apart he North and me South, and at half the difference between us, 1.00 chain, we set a Limestone 6x11x20 inches square for the dividing line between Mo. and Nebr. Marked M. and N.

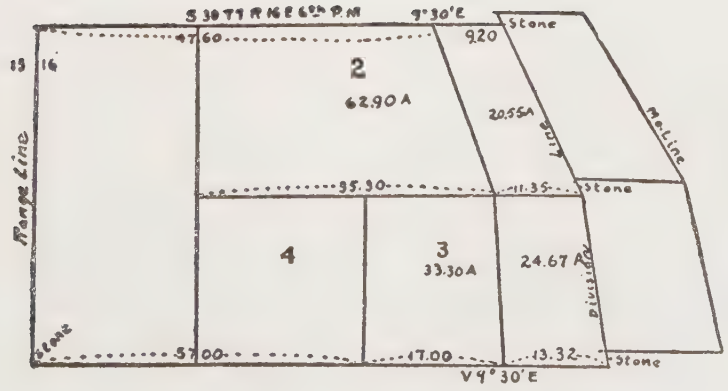
Whole distence across 22.70 chaines. Half the distence across 11.35 chaines.

*603

SURVEYOR'S RECORD 220

No 7 PLAT.

Section 30. Township 7N Range 16E 6th P.M. Nebr.



J. M. Hacker.
County Surveyor.

*604 * FIELD NOTES.

No. of Survey.....Date From February 25th to March 29th 1895
Survey for Nemaha County Nebraska
At request of the Board of County Commissioners of Nemaha County Nebr.
Chainman sworn W. T. Hacker and H. D Hacker.
Point established division of Accretions Sec 31, Twp, 7 N, Rng. 16 E, 6th P. M.

Commencing at the meander corner on the Nebraska bank of the Old Missouri River bed at the intersection of the Township line between Townships 6 and 7 North of Range 16 East of the 6th P. M. in Nebr. with the Old Missouri River bed. Said meander corner being the S E. corner of Lot No 7 in Sec 31 Town 7 N of R 16 E of the 6th P. M. in Nebraska.

And run thence East for the purpose of meeting D. A. Quick County Surveyor of Atchison county Missouri coming from the Missouri side of the Old Missouri River bed on a division of the Accretions formed in the Old Missouri River bed, and at 16.02 chaines set a stake for half way and came out 89 links apart he North and me South and at half the difference between us, 44½ links, we set a Limestone 6x15x35 inches square for the dividing line between Missouri and Nebr. marked M & N.

Whole distence across the Old River bed 32.04 chaines. Half the distence across 16.02 ch.

Commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S E. meander cor. of Lot 6 and the N E corner of Lot No 7 in S 31, T 7 N o R 16 E of 6th P. M in Nebr.

And run East to meete D. A. Quick County Surveyor of Atchison county Mo. running from the Mo. side on a division of the Accretions and at 12.84½ ch. set a stake & came out 89 lks. apart, he N & me S and at ½ the difference 44½ lks we set a Limestone 6x15x36 inches Sqr. for the dividing line be-
*605 tween * Mo. and Nebr. Marked M & N. Whole distence across 25.69 ch.

Half the distence across 12.84½ chaines. And commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S E. cor. of Lot 1, and the N E cor. of Lot 6 in S 31 T 7 N of R 16 E. of 6th P. M in Nebr. and run East to meet D. A. Quick County Surveyor of Atchison Co. Mo. running from the Mo. side on a division of the Accretions and at 14.87½ ch. set a stake & came out 1.00 ch. apart, he N and Me S at half the difference 50 lks. set a Limestone 6x15x30 inches sqr. for the dividing line between Mo. & Nebr. Marked M & N Whole dist. across 29.75 ch. Half the distence across 14.87½ ch. And Commencing at the East meander line of Lot 1 on the Nebr. bank of the Old Mo. river bed about 20.00 ch. N. of the SE. cor. of Lot 1 in S 31 T 7 N. R. 16 E of 6th P. M. in Nebr. and run East to meet D. A. Quick Co. Surveyor Atchison Co. Mo. running from the Mo. side on a division of the Accretions & at 13.09 ch. set a stake & came out 1.15 ch. apart he N & me S. at half the distence 57½ lks we set a Limestone 5x14x27 in. Sqr. for the dividing line between Mo. & Nebr. Marked M & N. Whole distence across 26.18 chaines.

Half the " " 13.09 chaines.

And Commencing at the meander corner on the Nebr. bank of the Old Mo.

river bed at the intersection of the line between S 30 & 31 in T 7, N. R 16 E of 6th P. M in Nebr. with the Old Mo River bed. It being the NE. cor. of Lot 1 in S 31 and the SE. cor. of Lot 3 in S 30, T 7, N. R 16 E and run East to meet D. A. Quick Surveyor of Atchison Co. Mo. Running from the Mo. side of the Old River bed on a division of the Accretions and at 13.32½ ch. set a stake and came out 1.53 chaines apart he N and me S at half the difference between us 76½ links set a Limestone 5x14x25 inc. sqr. for the dividing line between Mo. and Nebr. Marked M and N.

Whole distence across 26.65 chaines.

Half the distence across 13.32½ chaines.

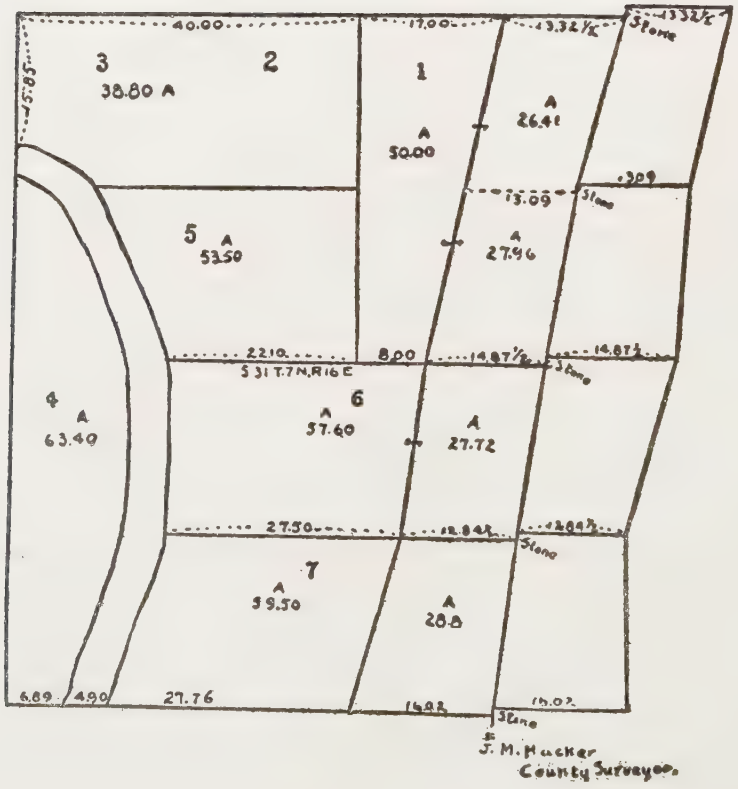
V 9° 30′ E

*606

SURVEYOR'S RECORD 219

N° 8 PLAT.

Section 31, Township 7 N. Range 16 E of 6th P.M. Nebr.



*607 * FIELD NOTES.

No. of Survey.....Date February 25th to March 29th 1895
Survey for Nemaha County Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker.
Point established Div. of Accretions to Sec. 6, Twp. 6 N, Rng. 16 E, 6th P. M.

Commencing at the meander corner of the Nebr. bank of the Old Mo. River bed at the intersection of the Township line between Towns. 6 and 7 N. of R. 16 E of the 6th P. M. in Nebr. with said river bed. Said corner being the N E. cor. of Lot 1 in S 6, T 6 N, R 16 E, and the S E. cor. of Lot 7 in S 31 T 7 N. R 16 E. of 6th P. M. in Nebr. And run East to meete D. A. Quick Surveyor of Atchison county Mo. running from the Mo. bank of the Old Mo. River bed on a division of Accretions in the Old Mo. river bed and at 16.02 ch. set a stake for half way and came out 89 links. apart he N and me S. at half the difference between us 44½ lks we set a Limestone 6x15x35 in. Sqr. for the dividing line between Mo. and Nebr. Marked M and N. Whole distence across 32.04 ch. Half the distence across 16.02 chaines. And commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S. W cor. of Lot 1 and the S E cor of Lot 2 in Sec. 6, T 6, N. R 16 E of the 6th P. M. in Nebr. And run East for the purpose of meeting D. A. Quick Surveyor of Atchison co. Mo. running from the Mo. side of the Old Mo. River bed on a division of Accretions in the Old river bed and at 21.71½ ch. set a stake and came out 3.48 ch. apart he N and me S. At half the difference between us 1.74 ch. we set a Limestone 6x15x40 in. Sqr. for the dividing line between Mo. and Nebr. Marked M. and N.

Whole distence across 43.43 chaines. Half the distince across 21.71½ chaines.

*608 * Commencing at the meander corner at the SW. cor. of Lot 1 and the SE. cor. of Lot 2 in S 6 T 6 N R 16 E of the 6th P. M. in Nebr. And run S 40° E to meet D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. side on a division of the Accretions, and at 15.68½ ch. set a stake and came out 1.98 ch. apart he E and me W. at half the difference between us 99 lks. we set a limestone 6x13x39 in. Sqr. for the dividing line between Mo. and Nebr. Marked M & N. Whole distence across 31.37 ch. Half the distence across 15.68½ ch.

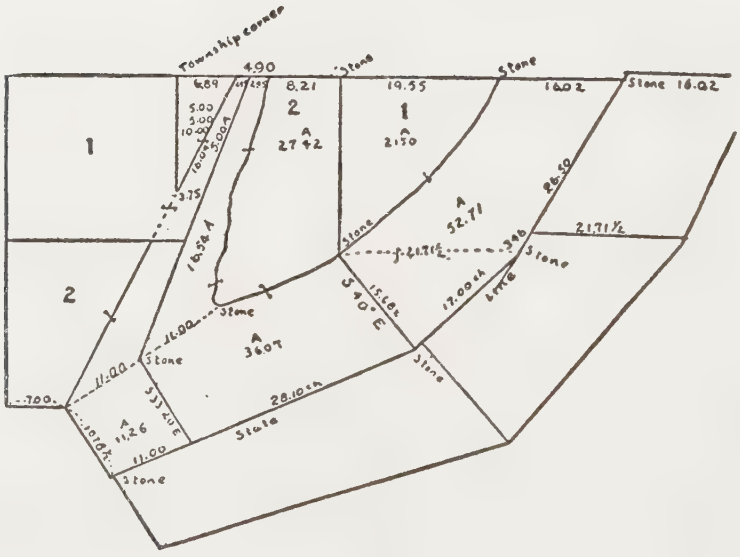
Commencing at a stone set N 54° E 11.00 ch. from the SE. cor. of Lot 2 Sec 1 T 6 R 15 E and at S 47° W 11.00 ch. from the SW. cor. of lot 2 in S 6 T 6. R 16 E 6th P. M. Nebr. and run S 33° 30′ E 11.70 ch. more or less to the dividing line between Mo. and Nebr.

*609

SURVEYOR'S RECORD 221

N° 9 PLAT.

Section 6 Township 6 N. Range 16 E 6th P.M. Nebr.



J. M. Hacker.
County Surveyor.

*610 * FIELD NOTES.

No. of Survey.....Date February 25th to March 29th 1895
Survey for Nemaha County Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker
Point established div. of Accretions to Sec. 1, Twp. 6 N, Rng. 15 E, 6th P. M.

Commencing at the meander corner on the Nebr. of the Old Mo. River bed at the SE. cor. of Lot 2 and the NE. cor. of Lot 3 in S 1 T 6 N. R 15 E of the 6th P. M. in Nebr. and run S 33° 30′ E and at 10.87½ ch. met D. A. Quick Surveyor of Atchison Co. Mo. on a division of Acretions with a difference of 26 lk between us, we set a Limestone 6x15x41 in. Sqr. for the dividing line between Mo. and Nebr., Marked M and N.

Whole distence across 21.57 ch. Half the distence across 10.78½ chaines.

Commencing on the Nebr. bank of the Old Mo. River bed at the SW. cor. of Lot 3, the SE. cor. of Lot 4 in S 1, T. 6, N. R 15 E of 6th P. M. in Nebr. And run South and at 7.27½ ch. & set a stake & met D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. bank of the old Mo. River bed, on a division of Accretions and came out with a difference of 55 links he E and me W. at half the difference between us 27½ lks. we set a Limestone 8x10x23 in. Sqr. for the dividing line between Mo. & Nebr. marked M & N. Whole distence across 14.55 ch. Half the distence 7.27½ ch.

Commencing on the Nebr. bank of the old Mo. River bed at the intersection of the section line between Sec 1 and 2 in T 6 N. R 15 E 6th P. M. in Nebr. with the Old Mo. River bed being the SW. cor. of Lot 5 in S 1 and the SE. cor. of Lot 8 in S 2 T 6 R 15 E in Neb. and run South and at 16.64 ch. set a stake and met D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo.
*611 bank of the old Mo. River bed on a division * of Accretions and came out 30 links apart he E and me West and at half the difference 15 lks. we set a Limestone 6x6x30 in. sqr. for the dividing line between Mo. and Nebr. Marked M and N. Whole distence across 33.28 chaines Half the distence across 16.64 chaines.

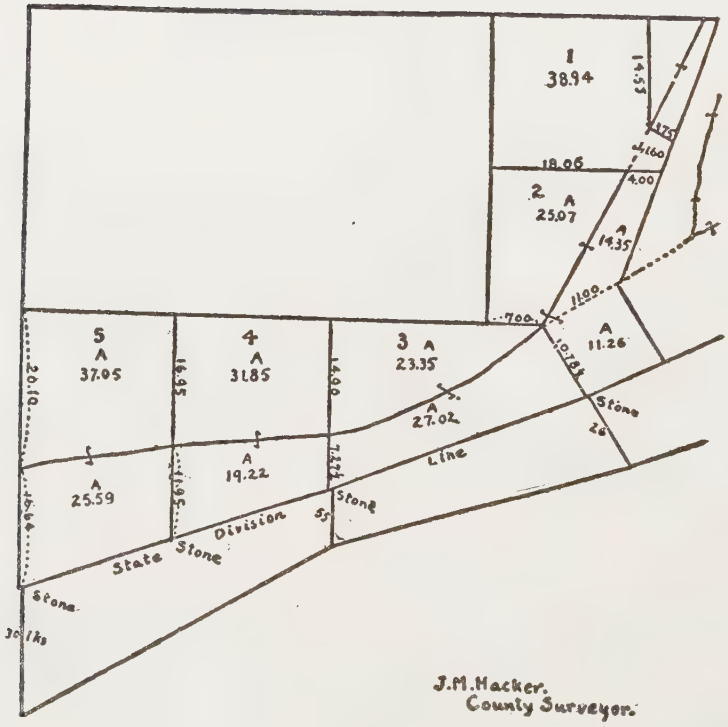
Commencing on the Nebr. bank of the Old Mo. River bed at the SW. cor. of Lot 4 the SE. cor. of Lot 5 in S 1 T 6 N. R 15 E 6th P. M. in Nebr. and run South 11.95 chaines more or less to the dividing line between Mo. and Nebr. and set a Limestone 10x12x16 inches sqr. Marked M and N.

*612

SURVEYOR'S RECORD 222

No 10 PLAT.

Section 1. Township 6 N. Range 15 E. 6th P.M. Nebr.



*613 * FIELD NOTES.

No. of Survey.....Date February 25th to March 29th 1895
Survey for Nemaha county Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker

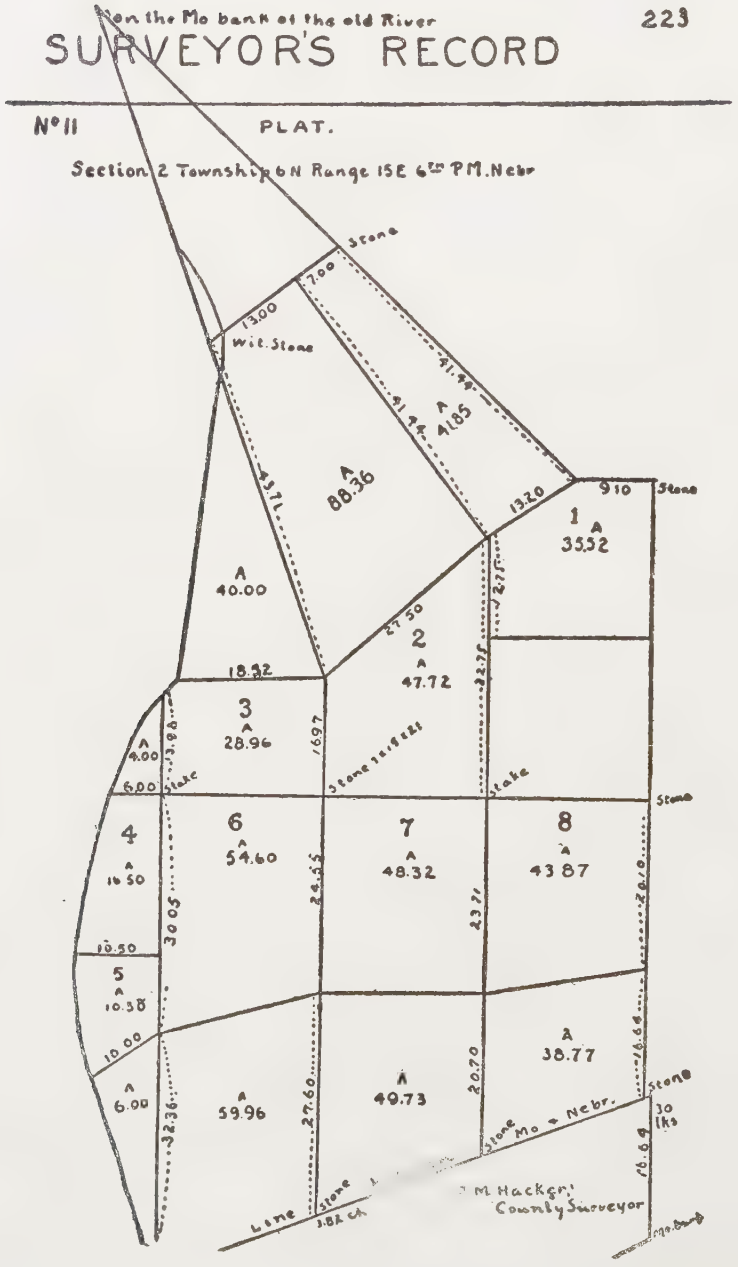
Point established Div. of Accretions to Sec. 2, Twp. 6 N, Rng. 15 E, 6th P. M.

Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor of Lot 5 in S 1 and SE. cor. of Lot 8 in S 2 T 6 N. R 15 E and run South to meet Surveyor Quick running from the Mo. bank of said River bed on a division of Accretions, at 16.64 ch. set a stake and came out thirty lks W. of Quick's line at half the difference 15 lks. we set a Limestone 6x6x30 in. Sqr. for the dividing line between Mo. and Nebr. Marked M and N. Whole distence across 33.28 chs.

Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor. of Lot 7, and the SE. cor. of Lot 6 in S 2 T 6. R 15 E. and run South to meet Surveyor Quick running on division of Accretions at 27.06½ ch. set a stake and was 3.84 ch. West of Quick at half the difference 1.93 ch. we set a Limestone 7x8x20 in. Sqr. for the dividing line between Mo. & Nebr. Marked M & N. Whole distence across 55.21 ch. Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor. of Lot 6 and the SE. cor. of Lot 5 in S 2 T 6 R 15 E and run South to meet Surveyor Quick running North on a division of Accretions at 32.36 ch. set a stake and was 80 links West of Quick's line at half the diffirence 40 lks we set a Limestone 7x14x23 in. Sqr for the dividing line between Mo. & Nebr. Marked M & N. Whole distence across 64.72 chs. Commencing on the Nebr. bank of the Old Mo. River bed at a corner 9.10 chs. West of the NE. cor. of S 2, T 6 N. R 15 E and run N 47° W at 40.00 ch set a random stake and at 82.88 chs. came to a cor. on the Mo. bank of the Old Mo. river bed, Run with Surveyor Quick,- Correcting back we corrected the

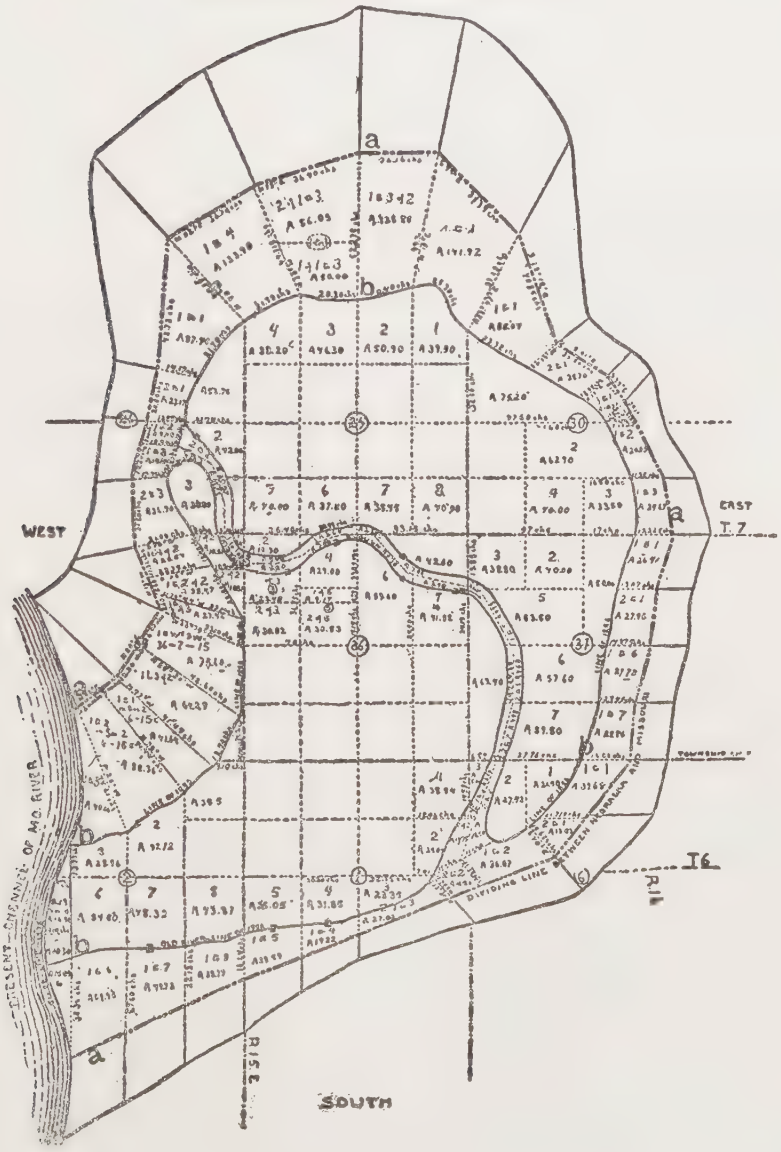
*614 * stake set at 40.00 chs., to 41.44 ch. and set a Limestone 7x12x25 in. Sqr. for the dividing line between Mo. & Nebr. Marked M. & N. Whole distence across 82.88 chs. Commencing on the Nebr. bank of the Old Mo. river bed at the NW. cor. of Lot 2 and NE. cor. of Lot 3 in S 2 T 6 R 15 E and run N 20° W at 40.00 chs. set a stake and at 86.42 chs. came to a Cor. on the Mo. bank of the Old Mo. river bed. Run with surveyor Quick. Correcting back we corrected the stake set at 40.00 chs. to 43.21 chs. and set a Limestone 6x15x25 in. Sqr. as a Witness Corner N 50° E 3.00 ch. the true corner being in a hole of watter on the sand bar. Marked M & N and on the dividing line between Mo. & Nebr. The distence from the SE. cor. of Lot 4 S 2 T 6 R 15 E, North to the Mo. river is 13.99 ch. And from the SE. cor. of said Lot 4. West is 6.00 chs. to the Mo. River. And the distence from the NE. cor. of Lot 5 in said S 2 to the Mo. River is 10.50 chs. And South from the NE. cor. of said Lot 5 is 10.05 ch. to the old Mo. River bed. Then Commencing on the Nebr. bank of the Old Mo. river bed at the SE cor. of Lot 7, the SW. cor. of Lot 8 in S 2, T 6 R 15 E and Run S. 20.70 chs. to the dividing line between Mo & Nebr. and set a Limestone 7x13x27 in. Sqr. Marked M. & N. Dividing Accretions between Lots 7 & 8 S 2. Commencing at the NW cor. of Lot 1, the NE cor. of Lot 2, in said S 2, and run N 30° W 41.44 chs. and set a stake at the dividing line between Mo and Nebr. Run to find the amount of Accretions to Lots 1 and 2 in S 2 T 6 N R 15 E of 6th P. M. in Nebraska.

*615

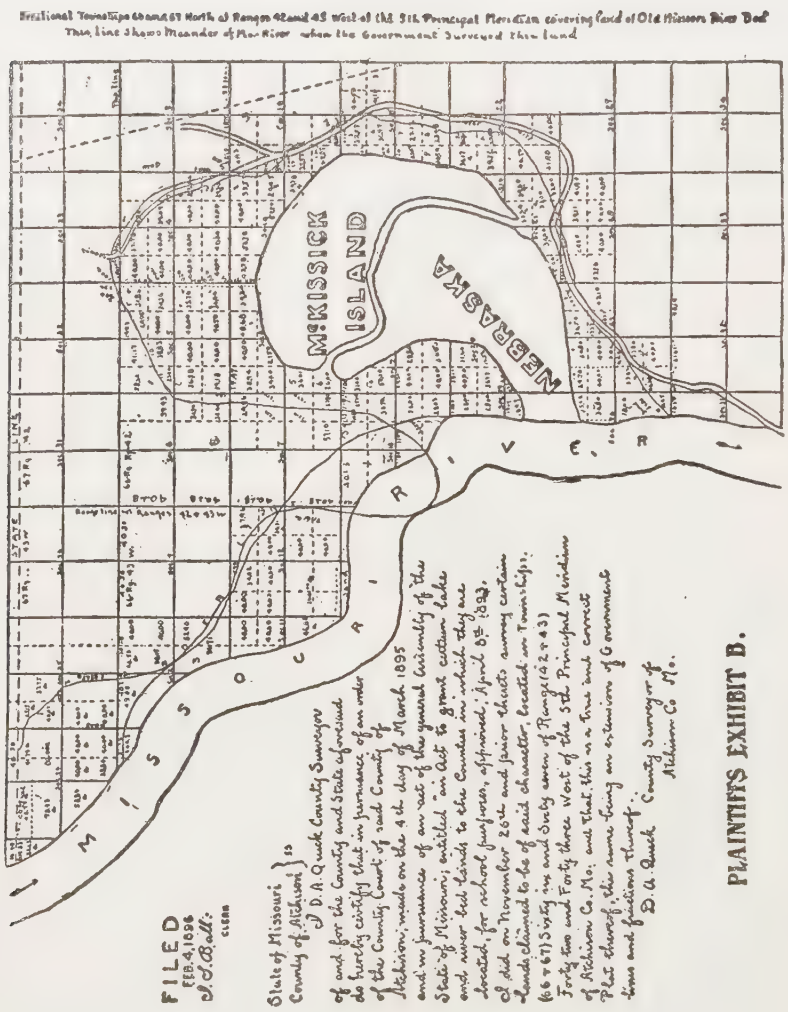

on the Mo bank of the old River
223
SURVEYOR'S RECORD
N°11
PLAT.
Section 2 Township 6N Range 15E 6th PM. Nebr
Stone
7.00
13.00
Wit. Stone
41.44
A 41.85
A 88.36
13.20
9.10
Stone
1
A 35.52
A 40.00
27.50
2
A 47.72
18.32
3
A 28.96
9.00
6.00
Stake
Stone
Stake
Stone
4
A 16.50
6
A 54.60
7
A 48.32
8
A 43.87
10.50
5
A 10.38
10.00
A 6.00
A 59.96
A 49.73
A 38.77
Stone
30 lks
Stone Mo - Nebr.
M Hackett
County Surveyor
Lime
Stone
3.82 ch

*616

DEFENDANTS EXIBIT B.



*617


Fractional Township 69 and 69 North of Ranges 42 and 43 West of the 5th Principal Meridian covering land of Old Missouri River Bed
This line shows Meander of Mo River when the Government Surveyed this land
MISSOURI RIVER
MISSICK ISLAND
NEBRASKA
FILED
FEB. 4, 1896
PLAINTIFFS EXHIBIT B.

*618 * *And it is further ordered, adjudged and decreed* by the court that the Commissioners heretofore appointed, namely, Alfred Hazlett, Esq., and John W. Halliburton, Esq., be, and they are hereby, directed to establish, or cause to be established, under their direction, permanent monuments marking said boundary line between the State of Missouri and the State of Nebraska, as shown by said aforesaid surveys, and that said Commissioners establish such permanent monuments upon said boundary line as may in their opinion be necessary for permanently marking and establishing the same, and that they make a report to this court of their acts and doings therein, and that said report contain a full and complete description of said boundary line and the monuments thereon established. And that in the execution of this decree said Commissioners are hereby authorized to employ such surveyors and other assistants, and procure such material as may be necessary in the establishment of said permanent monuments marking said boundary line, in accordance with the decree of this court.

And it is further ordered that said Commissioners be paid for their services herein such compensation as may be agreed upon by the respective parties to this suit and said Commissioners, and if the parties to this suit and said Commissioners, are unable to agree upon said compensation, such compensation shall be awarded to said Commissioners as in the opinion of this court, upon the filing of the final report of said Commissioners, may seem proper.

It is further ordered that said Commissioners make said final report of their acts and doings in the premises to this court on or before the 15th day of May, 1905.

March 6, 1905.

State of South Carolina v. United States.

Supreme Court of the United States, 1905.

[199 *United States,* 437.]

Persons who sell liquor are not relieved from liability for the internal revenue tax imposed by the Federal Government by the fact that they have no interest in the profits of the business and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquor. They are persons within the meaning of sections 3140, 3232 and 3244 Rev. Stat.

The National Government is one of enumerated powers, and a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.

To preserve the even balance between the National and state governments and hold each in its separate sphere is the duty of all courts, and pre-eminently of this court.

The Constitution is a written instrument, and, as such, its meaning does not alter. Its language, as a grant of power to the National Government, is general and, as changes come in social and political life, it embraces all new conditions within the scope of the powers conferred.

In interpreting the Constitution recourse must be had to the common law, and also to the

*438 position of the framers of the instrument, and what they * must have understood to be the meaning and scope of the grants of power contained therein must be considered.

That which is implied is as much a part of the Constitution as that which is expressed, and amongst the implied matters is that the Nation may not prevent a State from discharging the ordinary functions of government, and no State can interfere with the National Government in the free exercise of the powers conferred upon it.

The framers of the Constitution in granting to the National Government full power over license taxes intended that the power should be complete and not to be destroyed by the States extending their functions in a manner not then contemplated.

A State may control the sale of liquor by the dispensary system adopted in South Carolina, but when it does so it engages in ordinary private business which is not, by the mere fact that it is being conducted by a State, exempted from the operation of the taxing power of the National Government.

The internal revenue tax on the sale of liquor is not a tax on property or profits of a business but a charge on the business irrespective of the property used therein, or the profits realized therefrom.

The exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business.

By several statutes, the State of South Carolina established dispensaries for the wholesale and retail sale of liquor, and prohibited sale by other than the dispensaries. The United States demanded the license taxes prescribed by the internal revenue act for dealers in intoxicating liquors, and the dispensers filed the statutory applications for such licenses. The State, sometimes in cash and sometimes by warrant on its treasury, paid the taxes. No protest was made in reference to these payments prior to April 14, 1901. On that day a formal protest by the state dispensary commissioner was filed with the United States collector of internal revenue at Columbia, South Carolina. No appeal or application for the repayment of the sums paid by the various dispensaries was made by them or by the State of South Carolina to the Commissioner of Internal Revenue, as authorized by sections 3226, 3227 and 3228 Rev. Stat.

*439 The dispensers had no interest in the sales and received no * profit therefrom. The entire profits were appropriated by the State, one-half being divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the state treasury. In the year 1901 the profits arising from these sales amounted to $545,248.12. While the laws of South Carolina prohibited the sale of liquor by individuals other than the dispensers, of 373 special license stamps issued in that State by the United States internal revenue collector, only 112 were to dispensers, while 260 were to private individuals. Three separate actions were commenced in the Court of Claims by the State of South Carolina to recover the amounts paid for these license taxes. These actions were consolidated. Upon a hearing findings of fact were made and a judgment entered for the United States. 39 Court of Claims Reports, 257[1] Whereupon the State appealed to this court.

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[1]The points decided by the Court of Claims, as stated in the syllabus of the opinion delivered by the Chief Justice of that court, are as follows:

I. The buying and selling of alcoholic liquors for a profit stamps upon the South Carolina dispensary system a commercial character in addition to that of a police regulation.

*440 * *Mr. Jackson H. Ralston,* with whom *Mr. Franklin H. Mackey* (now deceased) and *Mr. Frederick L. Siddons* were on the brief, for appellant:

The provisions of sections 3232 and 3244 of the Revised Statutes apply to "persons" and not to a State of the Federal Union or its instrumentalities of government.

The attorneys general have so held. 12 Op. 176, 277, 376, 402; 13 Op. 67, 439. Also the courts. *Georgia* v. *Atkins,* 35 Georgia, 315; *United States* v. *B. & O. R. R. Co.,* 17 Wall. 322; *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *Collector* v. *Day,* 11 Wall. 113; *Dobbins* v. *Erie County,* 16 Pet. 435; *United States* v. *Louisville,* 169 U. S. 249.

It is true that for the purpose of effectuating justice and sustaining the jurisdiction of courts, States have been held to be persons. *Honduras* v. *Soto,* 112 N. Y. 310; *Martin* v. *State,* 24 Texas, 61, but this is not the ordinary or legal interpretation of the word. *United States* v. *Fox,* 94 U. S. 315; *McBride* v. *Reice County,* 44 Fed. Rep. 17. *Salt Lake City* v. *Hollister,* 118 U. S. 256, distinguished, see *Manufacturing Co.* v. *Improvement Co.,* 25 Washington, 667. In the congressional definition given by Congress in the act of 1877 to the word "Person," States were not included.

The Constitution contains no grant of power to Congress, express or implied, to tax a State or its means and instrumentalities of government; and the exercise by Congress of a power not expressly or impliedly granted by the Constitution to it is impliedly forbidden. Cooley's Const. Lim. § 480;
*441 * *McCulloch* v. *Maryland,* 4 Wheat. 316, 432; *Income Tax Case,* 157 U. S. 429.

State property and state instrumentalities in the administration of its government cannot be taxed, directly or indirectly, by the Federal Government. *Warren* v. *Paul, 22* Indiana, 276; *State* v. *Gaston,* 32 Indiana, 1; *Jones* v. *Keep,* 19 Wisconsin, 390; *Sayler* v. *Davis, 22* Wisconsin, 225; *Union Bank* v. *Hill,* 3 Coldw. (Tenn.) 325; *Smith* v. *Short,* 40 Alabama, 385; *Freedman* v. *Sigel,* 10 Blatchf. C. C. 327.

"The power to tax includes the power to destroy;" therefore the police power, like the judicial power of a State, may be destroyed by Congress under

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II. The framers of the Constitution had before them three purposes: The construction of a new National Government; the establishment of a dual system of government with the distribution of powers between the General or National Government and and the local or state Governments; the placing of certain immutable restrictions upon the powers of government to secure the individual rights of the citizens. They attempted no restrictive legislation, but left the people of the United States free to make their own laws.

III. The national authority to *"lay and collect taxes, duties, imposts, and excises"* is expressly given; the police power, whether of the National or state Governments, is neither given nor restricted by the Constitution.

IV. The police power is the power to impose those restraints upon private rights which are necessary for the general welfare. It is a power inherent in all governments, needing neither grant nor recognition by the Constitution.

V. The general welfare is one thing; exemption from taxation is another. If a State unites in one undertaking an exercise of the police power with a commercial business, the National Government can not be compelled to aid the operation of the police power by foregoing its constitutional right to lay and collect an impost or excise on the business part of the transaction.

VI. The Constitution contains no grant of power, express or implied, which authorizes the General Government to tax a State through its means and instrumentalities of government; but an excise on the dealer is a tax upon the consumer; and the exemption of the State from taxation extends no further than the functions belonging to a State in its ordinary capacity.

VII. The principle which rules and guides in such cases is this: The exemption of sovereignty extends no further than the attributes of sovereignty.

the guise of taxation, if the right to tax it exists at all. If Congress can tax the instrumentalities chosen by the State to carry out its police power, then, under the plea of the right to tax, it may tax the dispensary agents so heavily as to tax them out of existence as it did the state banks. *Fifield* v. *Close,* 15 Michigan, 505.

The Internal Revenue Office, even while demanding this tax, has from time to time passed on this constitutional question of the limitation upon the taxing power of the United States over state instrumentalities, and has invariably conceded the principle now contended for. See Int. Rev. Rec., 145, 1870.

The United States holds the money collected from the dispensaries to the use of the State and must refund it.

This money has been paid by the revenue collector into the United States Treasury. To whom does it belong? The answer, of course, is that it is *ex æquo et bono* the money of the State of South Carolina. The United States holds it in good conscience to the use of the State. *Johnson's Case,* 17 C. Cl. 157; *Devlin's Case,* 12 C. Cl. 266; *United States* v. *Bank,* 96 U. S. 30.

In the case at bar it was obtained by an honest mistake. Fraud, accident, and *mistake* are alike equitable grounds of relief. Money paid under a mistake of law and not of fact by private parties cannot generally be recovered, *442 but that * doctrine does not apply to a State. *Barnes* v. *District of Columbia, 22* C. Cl. 366, 394; *Wisconsin R. R.* v. *United States,* 164 U. S. 190.

The money in the case at bar has been unlawfully obtained from the State by mistake of all the parties. No appeal to the Internal Revenue Commissioner is necessary—this is not a "revenue case." Sections 3226, 3227 and 3228 Rev. Stat., do not apply to a State. To appeal to the Commissioner would be a surrender by the State of the very point in controversy. *Fassett's Case,* 142 U. S. 479, 487; *De Lima* v. *Bidwell,* 182 U. S. 1, 178, which modifies or distinguishes *Nichols* v. *United States, 7* Wall. 122; see also *Boughton's Case,* 12 C. Cl. 330.

The money was paid without authority of the State which is not bound by the unauthorized act of the agent. Such is the case as to the United States. *Wis. Cent. R. R. Co.* v. *United States,* 164 U. S. 440, and the same doctrine applies to a State, especially when the recipient is the United States.

Money paid under mistake of law as this was may be recovered in this court even when a private party is the claimant, and, *a fortiori,* when a State, which can act only by its agents, is the claimant, and the Court of Claims has jurisdiction under the Tucker act. *Snell* v. *Insurance Co.,* 98 U. S. 85, 90; *United States* v. *Bank,* 96 U. S. 30.

The dispensary law is constitutional and is a legitimate exercise by the State of its police power. *Crowley* v. *Christensen,* 137 U. S. 90; *George* v. *Aiken,* 42 So. Car. 222.

The dispensary system comes well within the police powers of the State, for if a State may take a perfectly worthless piece of paper and, by stamping certain arrangements of words and figures upon it, sell that paper as a license to an individual to carry on the liquor business, making thereby a direct profit, it does no act differing in any degree in principle if, instead of selling such paper privilege, it sells the liquor itself. In either event, the prime object is to control within certain fixed limits the traffic in an article, the excessive use of *443 which is confessedly * an evil, and it may not be said that because under one system or the other a profit arises to the State, therefore the police powers of the State are being improperly exercised for commercial ends. *License Cases,* 5 How. 583; *Vance* v. *Vandercook Co.,* 170 U. S. 444.

The statute must be construed as it stands. If Congress intended to subject States to the tax it is a case of *casus omissus* and the court cannot supply the

lacking words. *Denn* v. *Reid,* 10 Pet. 527; *Bate Co.* v. *Sulzberger,* 157 U. S. 57; *Lake County* v. *Rollins,* 130 U. S. 662.

The Solicitor General for the United States:

The State is fairly covered by the language of the law. A municipal corporation, a State, a foreign State and the United States may be included by the word "person" or "corporation" in a statute; regarding a State as possessing a corporate and municipal side as well as a sovereign character. *Martin* v. *State,* 24 Texas, 61; *Indiana* v. *Woram,* 6 Hill (N. Y.), 33; *Lancaster Co.* v. *Trimble,* 34 Nebraska, 752; *Kansas* v. *Herold,* 9 Kansas, 194; *Republic of Honduras* v. *Soto,* 112 N. Y. 310; *Salt Lake City* v. *Hollister,* 118 U. S. 256. Opinions of the Attorneys General to the contrary have either been overruled or are distinguishable, as they relate to attempts to tax the property or legitimate governmental instrumentalities of a State. 12 Op. 176, 277, 376, 402; 13 Op. 67, 439; *National Bank* v. *United States,* 101 U. S. 1. The principle of exemption from the Federal taxing power on this ground has been frequently stated. *Income Tax Cases,* 157 U. S. 429, 584; *United States* v. *B. & O. R. R.,* 17 Wall. 322. In the latter case, describing objects beyond the taxing power of Congress, the language is,—"all necessary agencies for legitimate purposes of state government." This case is outside the rule; the business taxed is not such an agency. In state liquor licenses the documentary license required by state laws is exempt from Federal taxation, but the business is not. Former internal revenue
*444 rulings to the contrary have related to laws like those of Maine, * Massachusetts and Vermont, which were a real measure of prohibition and only permitted sales for limited purposes, medicinal and industrial. For that reason the State's agents were relieved of the special tax. This is not a tax on persons or property at all, but an excise resting on the sale of the goods and paid in the last analysis by the consumer. It is a tax on the business; it is merely an expense of that business. There is no burden on the State or its property. The taxation is indirect and is valid as a mere excise on the transaction of a business. *Pacific Ins. Co.* v. *Soule,* 7 Wall. 433; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Scholey* v. *Rew,* 23 Wall. 331; *Nicol* v. *Ames,* 173 U. S. 509; *Knowlton* v. *Moore,* 178 U. S. 41; *Patton* v. *Brady,* 184 U. S. 608; *Spreckles Refining Co.* v. *McClain,* 192 U. S. 397.

The excise is levied pursuant to express constitutional grant of power. The reserved police power of the States cannot control the powers created or prohibitions imposed by the Constitution. The Federal taxing power is broad and untrammeled. It runs concurrently with the state taxing power when they affect the same objects. A liquor excise is about the most familiar example of its operation and scope. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Gibbons* v. *Ogden,* 9 Wheat. 1; *License Tax Cases,* 5 Wall. 462; *Austin* v. *Alderman,* 7 Wall. 694; *Knowlton* v. *Moore,* 178 U. S. 41; *The Oleomargarine Cases,* 195 U. S. 27. State police power is subordinate to Federal power under the Constitution. *Bowman* v. *Chicago & Northwestern R. Co.,* 125 U. S. 465; 507; *Railroad Co.* v. *Husen,* 95 U. S. 465, 473. This rule applies to interstate commerce in liquor, *Walling* v. *Michigan,* 116 U. S. 446; *Leisy* v. *Hardin,* 135 U. S. 100; *Lyng* v. *Michigan,* 135 U. S. 161, although permissive legislation of Congress now recognizes a larger state control than formerly. *In re Rahrer,* 140 U. S. 545; *Rhodes* v. *Iowa,* 170 U. S. 412; *Vance* v. *Vandercook Co.,* 170 U. S. 438; *American Express Co.* v. *Iowa,* 196 U. S. 133. But in the absence of such permissive legislation the States may not, under their police power, interfere with interstate com-
*445 merce. * The principle of the absoluteness of a power or right under the Constitution is illustrated by its prohibitions. States cannot impair their contracts, and the assertion of the police power must yield to this prohibition.

Bridge Proprietors v. *Hoboken Co.,* 1 Wall. 116; *The Binghamton Bridge,* 3 Wall. 51; *Asylum* v. *Home of the Friendless,* 8 Wall. 430; *Humphrey* v. *Pegues,* 16 Wall. 244, 248, 249; *Farrington* v. *Tennessee,* 95 U. S. 679, 689; *Asylum* v. *New Orleans,* 105 U. S. 362, 368. State statutes are unconstitutional whenever they conflict by their necessary operation and effect, with the paramount authority of Congress. *Henderson* v. *Mayor,* 92 U. S. 259; *Chy Lung* v. *Freeman,* 92 U. S. 275. Although the police power is from its nature incapable of exact definition or limitation, *Slaughter-house Cases,* 16 Wall, 36; *Stone* v. *Mississippi,* 101 U. S. 814, 818, all definitions must "be taken subject to the condition that the State cannot, in the exercise for any purpose whatever, encroach upon the powers of the general Government or rights granted or secured by the supreme law of the land. A municipal agency of the State is subject to Federal taxation, although the effect of that tax may be destructive. *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650. The bank tax cases control the present case. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *National Bank* v. *United States,* 101 U. S. 1.

The dispensary system is not a valid exercise of the police power, and the State has deliberately embarked in a commercial enterprise for the sole object of profit. The consequences of construction are not conclusive, yet are often worthy of notice. *United States* v. *Edmonston,* 181 U. S. 500. If the State's contentions are well founded, she may assume entire control of the manufacture and sale of liquors and tobacco without paying taxes; she may import free liquors and drugs and cloths; she may engage in any business whatever, under the police claim, on just as good grounds, and claim to be free of all Federal taxation. If some States chose to follow the lead of Australia or New
*446 Zealand, on the theory of the government * ownership of land and leases to occupants in place of private ownership and title, the right of direct taxation also by the United States would fall before its claim. If one State could pursue these theories, all States could, and the result would be that the Federal power of taxation, both direct and indirect, would be destroyed.

A State is the sole and absolute judge whether the liquor traffic is inherently injurious to the health, morals and welfare of its people. The State, if of opinion that liquors are injurious, may prohibit their sale as a beverage absolutely, or may restrict and regulate under high license. It cannot, however, under the pretense of remedying evils, forbid citizens to engage in the business and then turn it into a government monopoly. This law is entirely unlike those which, declaring that the sale and consumption of liquor are harmful, permit sale in a limited way only for medicinal and mechanical purposes, but prohibit sale as a beverage to everyone. The South Carolina law is not the exercise of legitimate power of police reserved to the States. *Mugler* v. *Kansas,* 123 U. S. 623, 661; *Minnesota* v. *Barber,* 136 U. S. 313; *Brimmer* v. *Rebman,* 138 U. S. 78; *Voight* v. *Wright,* 141 U. S. 62; *Booth* v. *Illinois,* 184 U. S. 425, 429.

Is the trade incident to the police regulation, or the police regulation incident to the trade? Examination of the South Carolina statutes of 1892 and 1893, with their later amendments, and consideration of the messages of her governors from 1892 on, with other public state documents, show clearly that the dispensary system does not purport to be a police regulation of the liquor traffic, but merely a scheme whereby the State realizes the profits of the business instead of private individuals. The net profits in one year were over $500,000.

When a State enters into business as a corporator, it lays down its sovereignty so far. *Bank of United States* v. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 2 Pet. 318; *Briscoe* v. *Bank of Kentucky,* 11 Pet. 323; *Railroad Co.* v. *Letson,* 2 How. 551; *Curran* v. *Arkansas,* 15 How. 308.
*447 This * principle applies, however the state's business may be conducted,

whether as member of a partnership or of a corporation or, as here, by the State acting alone and exercising an exclusive monopoly. The State chooses to step down from its sovereignty and must take the consequences. When the United States avails of the law merchant, it is bound by the rules of that law, notwithstanding its sovereignty. *United States* v. *Bank of Metropolis,* 15 Pet. 377, 392; *United States* v. *State Bank,* 96 U. S. 30, 36.

If a State embarks in the liquor business, it does so with the same consequences and subject to the same liabilities under the law as a private individual or an ordinary corporation; the internal revenue taxes collected from the South Carolina dispensary system were therefore properly exacted.

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. It is true a further question is made whether the act of Congress is broad enough to include such persons. But upon this we have little doubt. Section 3232 Rev. Stat. provides.

"No person shall be engaged in nor carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Section 3244, contains these words of description:

"Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

"Person" is also defined:

*448 * "Sec. 3140. . . . Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Now, the dispensers were persons who sold liquors. They applied for and received the licenses. True they were acting simply as agents of the State, but if the fact that the State was the principal creates no exemption from Federal taxation then the statute reaches them because they were the actual sellers.

We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preëminently of this—a duty oftentimes of great delicacy and difficulty.

Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is com-

prehensive and complete, without other limitations than those found in the Constitution itself.

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are
*449 within the scope of the powers in terms conferred. In other words, * while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Dred Scott* v. *Sandford,* 19 How. 393, 426:

"It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden,* 9 Wheat. 1, 188, well declared:

"As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

One other fact must be borne in mind, and that is that in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in *Smith* v. *Alabama,* 124 U. S. 465, 478:

*450 * "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

And by Mr. Justice Gray in *United States* v. *Wong Kim Ark,* 169 U. S. 649, 654:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett,* 21 Wall. 162; *Ex parte Wilson,* 114 U. S. 417, 422; *Boyd* v. *United States,* 116 U. S. 616, 624, 625; *Smith* v. *Alabama,* 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore* v. *United States,* 91 U. S. 270, 274."

To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution,

and inquire what they must have understood to be the meaning and scope of those grants.

By the first clause of section 8 of Article I of the Constitution, Congress is given the "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

By this clause the grant is limited in two ways: The revenue must be collected for public purposes, and all duties, imposts and excises must be uniform throughout the United States.

The fourth, fifth and sixth clauses of section 9 of Article I are:

"4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

"5. No tax or duty shall be laid on articles exported from any State.

*451 "6. No preference shall be given by any regulation of commerce * or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."

Article V of the Amendments provides that no one shall be deprived of "life, liberty, or property, without due process of law."

These are all the constitutional provisions that bear directly upon the subject. It will be seen that the only qualifications of the absolute, untrammeled power to lay and collect excises are that they shall be for public purposes, and that they shall be uniform throughout the United States. All other limitations named in the Constitution relate to taxes, duties and imposts. If, therefore, we confine our inquiry to the express provisions of the Constitution there is disclosed no limitation on the power of the General Government to collect license taxes.

But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. As said by Mr. Justice Miller in *Ex parte Yarbrough,* 110 U. S. 651, 658:

"The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed."

Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second

*452 clause of Article * VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the Nation is concerned, was affirmed at an early day in the great case of *M'Culloch* v. *Maryland,* 4 Wheat, 316, in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank. The case is familiar and needs not to be quoted from. No answer has ever been made to the argument of Mr. Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence. *Osborn* v. *Bank of United States,* 9 Wheat. 738; *Weston* v. *City Council of Charleston,* 2 Pet. 449; *Bank of Commerce* v. *New York,* 2 Black, 620; *Bank Tax Case,* 2 Wall. 200; *The Banks* v. *The Mayor,* 7 Wall. 16.

The limitations on the powers of the States to tax national banks are founded upon the doctrines laid down in that case. So also the immunity of national property from state taxation. It is true that in most of the enabling acts for the admission of new States there is express provision that the property of the Nation shall be free from state taxation, but as shown by Mr. Justice Gray, delivering the opinion of the court in *Van Brocklin* v. *Tennessee,* 117 U. S. 151, this provision is merely declaratory and unnecessary to establish the exemption of national property from state taxation. See also *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, as to taxation by a State of an officer of the United States for his office or its emoluments.

*453 * "The converse of this proposition has also been declared by the decisions of this court. In *Texas* v. *White,* 7 Wall. 700, 725, Mr. Chief Justice Chase, speaking for the court, declared:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

In *The Collector* v. *Day,* 11 Wall. 113, it was held that it was not competent for Congress to impose a tax upon the salary of a judicial officer of a State. In the opinion of the court, delivered by Mr. Justice Nelson, it was said (p. 127):

"It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

See also *United States* v. *Railroad Company,* 17 Wall. 322; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 584.

Upon this proposition counsel for plaintiff in error rely. There being no constitutional limit as to the amount of a license tax, and the power to tax being the power to destroy, if Congress can enforce such a tax against a State it may

destroy this effort of the State in the exercise of its police power to control the sale of liquor. It cannot be doubted that the regulation of the sale of
*454 liquor comes within the scope of the * police power, and equally true that the police power is in its fullest and broadest sense reserved to the States; that the mode of exercising that power is left to their discretion, and is not subject to National supervision. But if Congress may tax the agents of the State charged with the duty of selling intoxicating liquors, it in effect assumes a certain control over this police power, and thus may embarrass and even thwart the attempt of the State to carry on this mode of regulation.

We are not insensible to the force of this argument, and appreciate the difficulties which it presents, but let us see to what it leads. Each State is subject only to the limitations prescribed by the Constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that "the United States shall guarantee to every State in this Union a republican form of government." Art. IV, sec. 4. That expresses the full limit of National control over the internal affairs of a State.

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co., No. 1,* 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of
*455 course, this is an extreme view, * but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of

the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland, supra* (p. 431), for a complete answer:

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which
*456 they have confided their most important and * most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State.

There is something of a conflict between the full power of the Nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the convention intend should be exempt? Certain is it that modern notions as to the extent to which the functions of a State may be carried had then no hold. Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. While many believed that the liberty of the people
*457 depended on the preservation of the rights * of the States, they had no thought that those States would extend their functions beyond their then recognized scope, or so as to imperil the life of the Nation. As well said by Chief Justice Nott, delivering the opinion of the Court of Claims in this case (39 C. Cl. 284):

"Moreover, at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plant of a body politic to take up the work of the individual or body corporate. The public suspicion associated government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention there were men who trembled at the

power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's Amendments."

Looking, therefore, at the Constitution in the light of the condition surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it.

If we look upon the Constitution in the light of the common law we are led to the same conclusion. All the avenues of trade were open to the individual. The Government did not attempt to exclude him from any. Whatever restraints were put upon him were mere police regulations to control his conduct in
*458 the * business and not to exclude him therefrom. The Government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals. Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a State would attempt to monopolize any business heretofore carried on by individuals.

Further, it may be noticed that the tax is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in *United States* v. *Perkins,* 163 U. S. 625, and *Snyder* v. *Bettman,* 190 U. S. 249. In the former case a succession tax of the State of New York was sustained, although the property charged therewith was bequeathed by will to the United States, the court holding that the latter acquired no property until after the state charges for transmission had been paid, saying (p. 629):

"'This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution.'"

In *Snyder* v. *Bettman,* the succession tax required by the laws of Congress was sustained, although the bequest was to the city of Springfield, Ohio. This is almost a converse to the *Perkins case.* It was held that while the power to regulate inheritances and testamentary dispositions was one belonging to the State, and therefore subject to such conditions as the State might see fit to impose (as held in the *Perkins case*), yet the power to impose a succession tax was vested in Congress, that it could be exercised upon a bequest made to a municipality or a State, and was not to be considered as a tax upon the property bequeathed, the court saying (p. 254):

"Having determined, then, that Congress has the power to tax successions; that the States have the same power, and that such power extends to be-
*459 quests to the United States, it would * seem to follow logically that Congress has the same power to tax the transmission of property by legacy to

States, or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property."

So here the charge is not upon the property of the State, but upon the means by which that property is acquired, and before it is acquired.

It is also worthy of remark that the cases in which the invalidity of a Federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the State, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the State, in the discharge of its ordinary functions as a government.

In *Veazie Bank* v. *Fenno,* 8 Wall. 533, in which a National tax of ten per cent on the amount of notes of any person, state bank, or banking association, used for circulation, was sustained, the court thus stated the limits of the power of National taxation over state agencies (p. 547):

"It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress."

In *The Collector* v. *Day,* 11 Wall 113, cited *supra,* in the argument in favor of the exemption of the salary of a state judge from National taxation, is this language (p. 125):

"It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left
*460 free and unimpaired, should not be liable to be crippled, much less * defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *United States* v. *Railroad Company,* 17 Wall. 322, an attempt was made to collect a tax on money due from a railroad company to the city of Baltimore. It was held that the city was a portion of the State in the exercise of a limited portion of the powers of the State, and the court said (p. 327):

"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal Government."

And again (p. 332):

"We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to

distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action be an auxiliary of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position."

*461 * In *Ambrosini* v. *United States,* 187 U. S. 1, in which the Federal war revenue tax act, providing for stamp taxes on bonds, was held inapplicable to bonds required from licensees under the dram shop act of Illinois, the court declared (p. 8):

"The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity, and we are of the opinion that they were, and that they were exempted as no more taxable than the licenses."

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.

In this connection may be noticed the well-established distinction between the duties of a public character cast upon municipal corporations and those which relate to what may be considered their private business, and the different responsibility resulting in case of negligence in respect to the discharge of those duties. The Supreme Court of Massachusetts, speaking by Mr. Justice Gray (afterwards an Associate Justice of this court), in *Oliver* v. *Worcester,* 102 Massachusetts, 489, 499, 500, observed:

"The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public.

"To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns

*462 and cities alike, and from the performance * of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. . . ."

"But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument."

In *Lloyd* v. *Mayor &c. of New York,* 5 N. Y. 369, 374, the court said:

"The corporation of the city of New York possesses two kinds of powers, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty—the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual."

See also *Maximilian* v. *Mayor,* 62 N. Y. 160, 164; *Brown* v. *Vinalhaven,* 65 Maine, 402; *Mead* v. *City of New Haven,* 40 Connecticut, 72; *City of Petersburg* v. *Applegarth's Administrator,* 28 Gratt. 321, 343; *Eastman* v. *Meredith,* 36 N. H. 285; *Western Saving Fund Society* v. *City of Philadelphia,* 31 Pa. St. 175. In this case it was held that a city supplying gas to the inhabitants acts as a private corporation, and is subject to the same liabilities and disabilities. In the opinion the court declared (p. 183):

"Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the
*463 city as for the * public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant, does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred."

See further a subsequent case between the same parties, in the same volume (pp. 185, 189): *Bailey* v. *The Mayor &c.,* 3 Hill, 531; 1 Dillon, Mun. Corp., 4th ed., sec 66.

Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor is not invalidated by the fact that they are the agents of the State which has itself engaged in that business.

The judgment of the Court of Claims is

Affirmed.

*464 * Mr. Justice White, with whom concur Mr. Justice Peckham and Mr. Justice McKenna, dissenting.

The delicacy of the question, the suggestion that, apart from constitutional limitations, the ruling made is, from an economic point of view, a just one, and the long and painstaking consideration which the court has given the case causes

me to be reluctant to announce a dissent. This, however, is overborne by the conviction that it is my duty to dissent and state my reasons. And this because the decision now made, as it is by me understood, overrules many cases, departs from a principle which has been recognized from the beginning, and, under the assumed necessity of protecting the taxing power of the Government of the United States, establishes a doctrine which in its potentiality strips the States of their lawful authority. It does more than this, since the theory upon which the case is decided also endows the States with a like power to divest the Government of the United States of its lawful attributes. In other words, by the ruling and the reasoning sustaining it, the ancient landmarks are obliterated and the distinct powers belonging to both the National and state governments are reciprocally placed the one at the mercy of the other, so as to give to each the potency of destroying the other.

The case is this: South Carolina has adopted a law by which no liquor is allowed to be brought into the State for sale or to be sold therein, except such liquor as may be bought by a board of officers appointed by state authority, which liquor is sold by state agents appointed for that purpose under regulations prescribed by the statute. The question is, whether these agents of the State, for the act of selling liquor belonging to the State, as agents of the State, under the authority of the State, can be subjected to a license for carrying on the liquor business, levied by the internal revenue laws of the United States.

That the State, under its police authority, had the right to absolutely prohibit the sale of liquor, or to subject it to such regulations as it deemed
*465 proper, is elementary. So far-reaching * is that authority that a State may direct the destruction of liquor held contrary to law, without paying the value thereof, and without thereby violating the constitutional safeguards as to the taking of property. *Mugler* v. *Kansas,* 123 U. S. 623. True, by the operation of the commerce clause of the Constitution, the absolute authority of the State does not extend to prohibiting the sale in original packages of liquor brought in from other States. *Leisy* v. *Hardin,* 135 U. S. 100. But that limitation no longer applies, since Congress has, by express legislation, permitted the power of the States to attach to all liquor shipped into one State from another, at once on its arrival, before sale in the original packages, as fully as if it had been manufactured within the State. And the validity of the statute referred to has been upheld by the court in reiterated rulings. *In re Rahrer,* 140 U. S. 545, 562; *Rhodes* v. *Iowa,* 170 U. S. 412; *Vance* v. *W. A. Vandercook Co. No. 1,* 170 U. S. 438; *American Express Co.* v. *Iowa,* 196 U. S. 133; *Adams Express Co.* v. *Iowa,* 196 U. S. 147; *Pabst Brewing Co.* v. *Crenshaw,* 198 U. S. 17. Indeed, one of these cases—the *Vandercook case*—involved the question whether the act of South Carolina, providing for the purchase and sale of liquor belonging to the State, as above stated, was repugnant to the Constitution of the United States, and the validity of the act in this particular was upheld by the court, because of the police power of the State and because of the provisions of the act of Congress limiting the effect of the interstate commerce clause as to liquor as already mentioned.

It is not necessary to trace the want of authority of the United States to impose a license exaction on the agents of the State to an express provision of the Constitution, since the court has constantly held that the absence of authority in the Government of the United States to tax or burden the agencies or instru-

mentalities of a state government, and the like want of authority on the part of the States to tax the agencies or instrumentalities of the National Government, results from the dual system of government which the Constitution created,
*466 * and that the continuance in force of such a prohibition is absolutely essential to the preservation of both governments.

It would be superfluous to review in detail the many cases decided on the subject, but in the endeavor to bring the settled doctrine clearly to the mind, I refer to the most salient of the cases.

In *McCulloch* v. *Maryland* (1819), 4 Wheat. 316, and *Osborn* v. *Bank of the United States* (1824), 9 Wheat. 738, it was held that a State could not impose a tax on the operations of the Bank of the United States or any of its branches. In *Weston* v. *City Council of Charleston* (1829), 2 Pet. 449, *Bank of Commerce* v. *New York* (1862), 2 Black, 620, *Bank Tax Case* (1865), 2 Wall. 200, and *Banks* v. *Mayor* (1869), 7 Wall. 16, it was decided that a State was without power to tax stock or bonds issued by the United States for loans made to it, when held by an individual or by a corporation. In *Dobbins* v. *Commissioners of Erie County* (1842), 16 Pet. 435, it was decided that a State might not tax the compensation of an officer of the United States. And, in *Van Brocklin* v. *Tennessee* (1886), 117 U. S. 151, and cases cited on pages 167 *et seq.*, it was held that a State might not impose a tax on any property of the United States, including real estate of which the United States had become the owner as the result of a sale to enforce the payment of direct taxes previously levied by the United States.

Conversely, the adjudications concerning the want of power in the United States to tax the States are of a like scope. In *The Collector* v. *Day* (1870), 11 Wall. 113, 127, it was decided that Congress could not impose a tax upon the salary of a judicial officer of a State. In *United States* v. *Railroad Co.* (1872), 17 Wall. 322, it was held that the United States might not impose a tax upon the property and revenues of a municipal corporation. Two members of the court dissented (p. 334), on the ground "that the private property owned by a municipal corporation, and held merely as private property in a proprietary right, and used merely in a commercial sense for the income, gains, and profits,"
*467 was "taxable just the same as * property owned by an individual, or any other corporation." In *Van Brocklin* v. *Tennessee, supra,* where, as we have seen, it was held that the State of Tennessee could not tax real property within its borders while held by the United States as proprietor, in reviewing the ruling made in *United States* v. *Railroad Co.,* the court said (p. 178):

"This court, in *United States* v. *Railroad Co.,* 17 Wall. 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character,

must be so held. The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of a State, from Federal taxation, equally require the exemption of all the property and income of the National Government from state taxation."

In *Mercantile Bank* v. *New York* (1887), 121 U. S. 138, 162, it was decided that the United States might not tax bonds issued by a State or one of its municipal bodies under its authority and held by private corporations. In *Pollock* v. *Farmers' Loan and Trust Company*—the income tax case—(1894), 157 U. S. 429, although much difference of opinion was manifested in the court as to some of the questions involved, as to one, that is, the lack of authority in the United States to include in the amount of income subject to taxation by the United
*468 States money derived from interest on municipal bonds, * the court was unanimous. The opinion, in reviewing the subject and citing approvingly *The Collector* v. *Day, United States* v. *Railroad Co.,* the *Van Brocklin case* and the *Mercantile Bank case,* said (p. 584):

"As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

And, lastly, in *Ambrosini* v. *The United States* (1902), 187 U. S. 1, it was held that Congress could not impose a stamp tax upon a bond which the state law required to be given as a prerequisite to the right to sell liquor.

Is the ruling now made reconcilable with the cases just referred to? In other words, is it consistent with the theory of the Constitution as interpreted from the beginning? In order to give the reasons which convince me that it is not, let me review the contentions which are relied upon to support the ruling.

1. It is urged that as the State of South Carolina derives revenue from the sale, by the agents of the State, of the liquor belonging to the State, therefore the United States has also the right to derive a revenue from that source. If by this contention it is intended to suggest that the South Carolina law was not passed in the exercise of the police power of that State, and must be treated as a revenue law from the mere fact that some revenue results from the operation of the law, the unsoundness of the proposition is demonstrated by the previous cases. In *Vandercook Co., No. 1, supra,* that identical proposition was urged, and was decided to be without merit; and the same doctrine was reiterated in the cases of *American Express Company* v. *Iowa,* 196 U. S. 133; *Adams Express* v. *Iowa,* 196 U. S. 147, and *Pabst Brewing Co.* v. *Crenshaw,* 198 U. S. 17. If the contention be that wherever, by the exertion of state power upon persons or things, a
*469 revenue is produced, * there must be a corresponding right on the part of the Government of the United States to reap revenue by burdening the like person or thing, even although in so doing a state agency or instrumentality is taxed, the unsoundness of the proposition and its conflict with the previous cases becomes yet more apparent. One of the foundations upon which the doctrine rests, denying the power of the governments, State or National, to burden the instrumentalities or agencies of each other, is that if such burdening be permitted it might result in crippling the revenues of the Government, upon whose agency or instrumentality the tax was placed. Was this not the ground upon which the earlier cases were placed, and was it not specifically declared to be the founda-

tion of the ruling made in the income tax case—*Pollock* v. *The Farmers' Loan & Trust Co., supra?* The contention that because one government may have derived income from the exertion of its authority, therefore the other government has a right to do likewise, even if the agencies of the other government be thereby taxed, reduces itself to this: That the power to burden arises from the very condition which prevents the power from existing. If pushed to its logical conclusion, the far-reaching result of the proposition that wherever revenue is derived from an act by one government, therefore the other may burden the agent or instrumentality of the other may be readily illustrated. Take the National Government. If in the exercise of its ample authority to establish national banks a tax is imposed on such banks and a revenue derived, do the States thereby become entitled, without the consent of Congress, to tax banks? Take the Post Office Department. If by the carrying of the mails revenue is derived by the Government of the United States, are the States from that fact entitled to tax the instrumentalities employed by the Post Office Department? Take the ocean transport service of the United States. If under given circumstances a charge is made for transportation, and hence a revenue is earned, may the States cripple that service by taxation? It is no answer to the demonstration *470 * which results from these illustrations to say that the cases concern purely governmental functions of the United States, and, therefore, the States cannot tax the exercise of such functions. May I ask are these functions on the part of the United States any more governmental than is the power of the government of South Carolina to absolutely control at will the liquor traffic in that State?

2. It is implied that necessity demands the recognition of the right of the Government of the United States to tax the state agencies in question because the principle, by which alone such power on the part of the United States can be denied, will inevitably result in giving the States authority to destroy the Government of the United States by adopting peculiar methods of dealing with various classes of persons or property. Thus, it is said, the state governments may acquire all farms within their borders and thus deprive the United States of its power to impose a direct tax on land. That a State may import property from foreign countries and be exempt from import duty and undersell those who pay duty and render the collection of any import tax from others by the United States impossible. But these extreme illustrations amount simply to saying that it is possible for the imagination to foreshadow conditions which, did they arise, would impair the government created by the Constitution, and because such conjectures may be indulged in, the limitations created by the Constitution for the purpose of preserving both the state and National Governments are to be disregarded. In other words, that the government created by the Constitution must now be destroyed, because it is possible to suggest conditions which, if they arise, would in the future produce a like result. But the weakness of the illustration as applied to this case is apparent. They have no relation to this case, since it is not denied that as to liquor the State has absolute power, and may prohibit the sale of all liquor and thus prevent the United States from deriving revenue *471 from that source. Again, therefore, when the true relation * of the argument to the case in hand is seen, it reduces itself to a complete contradiction, viz., a State may by prohibition prevent the United States from reaping revenue from the liquor traffic, but any other state regulation by which such result

is accomplished may be prevented by the United States, because thereby the State has done indirectly only that which the State had the lawful power directly to do.

3. It is urged that the liquor in this case was owned by South Carolina, and in selling it the State was merely acting as a proprietor, and therefore the tax on the state agents is lawful. But here again the argument overlooks the absolute power possessed by the State concerning the liquor traffic, and the consequent right of the State in the exercise of its governmental functions to adopt such methods and instrumentalities as might be deemed best for the control of the traffic. Besides, the proposition is directly repugnant to the previous decisions of this court. Can anything be plainer than that the contention is directly antagonistic to the ruling made in *United States* v. *Railroad Co., supra,* which ruling was expressly approved in the subsequent cases, especially in the income tax case? Was not the United States the proprietor of the land in Tennessee, which it was held in the *Van Brocklin case* the State of Tennessee had no power to tax? Conceding, for the sake of argument only, that the doctrine announced in the previous cases should be qualified, certainly such qualification would be wholly unreasonable if it did not propose to take in view the absolute and paramount nature of the governmental function under which the property or agency which it was proposed to tax was held or exercised. Reference is made to cases in state courts concerning the liability of municipal corporations to suits for negligence. I cannot see their appositeness to the issue here involved. Besides, the doctrine expounded in the line of cases referred to, if doctrine can be deduced from the confusion and contradiction which exists among the cases, has never received the approval of this court. On the contrary, the rulings of
*472 this court point the other way. * *Barnes* v. *District of Columbia,* 91 U. S. 540; *Workman* v. *New York,* 179 U. S. 552, 574. But grant that the rule applied by some state courts, in order to determine when a municipal corporation may be sued for a negligent act, has relation to this case, my mind sees no possibility of holding that the State of South Carolina, when by the law in question it provided for the purchase and sale of liquor by its own agents, was not exercising a purely governmental function, in view of the absolute power of that State over that subject, and, moreover, in view of the act of Congress making such power complete and efficacious, even as to original packages of liquor before sale.

4. It is not, of course, by me denied that however varying may be the conditions to which the Constitution is applied, that instrument means to-day what it did at the time of its adoption; but I cannot give my assent to the doctrine that a limitation, which it has been decided over and over again arises from the very nature of the Constitution, is not to be enforced in a given condition to which the Constitution applies, because it does not appear that the framers could have contemplated that such conditions might be evolved in the course of the development of our constitutional institutions. To me it seems that no proposition could be more absolutely destructive of constitutional government.

Being of opinion that the State of South Carolina had complete and absolute power over the liquor traffic, and could exert, in dealing with that subject, such methods and instrumentalities as were deemed best, and that the United States was without authority to tax the agencies which the State called into being for the purpose of dealing with the liquor traffic, I, therefore dissent, and am authorized to say that Mr. Justice Peckham and Mr. Justice McKenna concur.

State of Missouri v. State of Illinois and the Sanitary District of Chicago.

Supreme Court of the United States, 1906.

[200 *United States,* 496.]

Missouri filed its bill in this court to enjoin Illinois and the Sanitary District of Chicago from discharging sewage through an artificial channel connecting Lake Michigan with the Desplaines River, a tributary of the Illinois, the latter of which empties into the Mississippi River above St. Louis, claiming that such sewage so polluted the water of the Mississippi as to render it unfit to drink and productive of typhoid fever and other diseases. Illinois denied the jurisdiction of this court, and the allegations of the bill, and alleged that if the conditions complained of at St. Louis existed they resulted from discharge of sewage into the Mississippi by cities of Missouri and from other causes for which Illinois was not responsible. A demurrer was overruled, with leave to answer, 180 U. S. 208; after answer and taking of proof including much expert testimony as to effect of sewage on water and health, *held,* that:

This court has jurisdiction and authority to deal with a question of this nature between two States, which, if it arose between two independent sovereignties, might lead to war.

In such a case, while this court can not take the place of a legislature it must determine whether there is any principle of law, and if any what, on which the plaintiff State can recover.

Every matter which would be cognizable in equity if between private citizens in the same jurisdiction would not warrant this court in interfering if such matter arose between States; this court should only intervene to enjoin the action of one State at the instance of another when the case is of serious magnitude, clearly and fully proved; and in such a case only such principles should be applied as this court is prepared deliberately to maintain.

While a State may have relief in this court against another State to prevent it from discharging sewage through an artificial channel into, and thereby polluting the waters of, a river flowing through both States and on which the complainant State relies for water supply, if the alleged facts as to such pollution are not fully proved, and it also appears that such pollution might result from the discharge of sewage by cities of the complainant State into the same river the bill should be dismissed,—but in this case without prejudice.

The reason on which prescription for a public nuisance is denied or granted to individuals against the sovereign power to which he is subject have no application to an independent state; but it would be contradicting a fundamental principle of human nature not to allow effect to the lapse of time. The fixing of a definite time, however, is usually for the legislature and not for the courts.

*497 * The mere fact that the drainage canal, constructed by authority of Illinois and also under authority of an act of Congress, brought water from the Lake Michigan watershed into the watershed of the Mississippi does not, in the absence of proof of the deleterious effects of such water, render the canal an unlawful structure, the use whereof should be enjoined at the instance of another State in the Mississippi watershed.

THE facts, which involved the right of the defendants to discharge the sewage of Chicago through an artificial channel into the Desplaines River which empties into a tributary of the Mississippi River, are stated in the opinion of the court.

Mr. Herbert S. Hadley, Attorney General of the State of Missouri, *Mr. Sam B. Jeffries* and *Mr. Charles W. Bates,* with whom *Mr. W. F. Woerner* was on the brief, for the complainant:

The substantial purpose of the complaint is to subject the construction and operation of the drainage channel from the Chicago River at Chicago, southwestwardly to the Desplaines River at Lockport, a point immediately above Joliet, to the court's supervision, upon the charge that the method of construction and operation creates and constitutes a continuing nuisance, dangerous to the health of the people of Missouri; and which if not restrained, results in the daily transportation, by artificial means, and through an unnatural channel, of large quantities of undefecated sewage, and of accumulated deposits in the harbor of Chicago, and in the bed of the Illinois River, which poison the water supply of the inhabitants of Missouri and injuriously affect that portion of the Mississippi River which lies within complainant's jurisdiction.

No attack is made upon the canal or artificial channel as an unlawful structure, nor is any attempt made to prevent its use as a waterway. Complainant seeks relief against the pouring of undefecated and unpurified sewage and filth through it by the artificial arrangements into the Mississippi River to the detriment of complainant and its inhabitants.

For the original bill see 180 U. S. 208, where defendants' demurrer was overruled.

*498 * The population of Chicago is about 2,000,000 and by its addition to the Mississippi watershed the urban population sewering into that river has been increased by seventy-five per cent. Lake Michigan is the natural basin for the sewage of Chicago. The expert evidence in this case shows that more polluting and infectious matèrial is now contained in the water than prior to the opening of the canal.

According to the science of bacteriology, it is practically impossible to discover in a contaminated water the disease producing organisms, so small are the organisms and so delicate the test to be made. It has, however, been observed, that where large quantities of *bacilli coli communis* have been found, it is a conclusive indication that the water is sewage polluted and, therefore, infected with disease producing organisms. The number of bacteria is important if the source of the polluting matter is known. However, bacteriologists when applying the science to the sanitary observations of water, disregard largely the number of bacteria and depend mostly upon the character of the pathogenic organisms found.

Typhoid bacilli, the most dangerous perhaps of any of the water borne diseases, has never been discovered in the waters of a running stream, save as to two or three reported instances, and from the present conditions of the science, their discovery is not a practical proposition. So it may be said that from the standpoint of bacteriology and chemistry as applied to sanitary observations, there is no direct means of proving the absolute presence of pathogenic bacteria in water. A water supply may be chemically without fault and yet contain many living disease producing organisms.

The effect of the sewage of Chicago upon the waters of the Mississippi River at the mouth of the Illinois has been such as if a large and populous city had been established on January 17, 1900, upon the banks of the Mississippi River discharging its sewage into the waters of that river. The chemical analysis discloses that the water in the Illinois River at Grafton contains more in

*499 fectious material, and material liable to * contain infection, than it did prior to the opening of the drainage canal. It also discloses that the waters of the Mississippi River above Grafton and the Missouri River are freer from contaminating and infectious matter than the waters of the Illinois. This, of course, is but a natural condition. The sewage of two millions of people could not have the effect of improving conditions at any point on the Illinois River.

As soon as the canal was opened the death rate from typhoid in St. Louis

started upward and has continued on the increase ever since. Typhoid mortality per 100,000 population in St. Louis for the years 1900, 1901, 1902 and 1903 increased 77.7 per cent over the typhoid mortality per 100,000 population in 1896, 1897, 1898 and 1899. This enormous increase occurred with no change in the manner of treating the water. The increase has been gradual, both in winter and summer seasons, with no relaxation in the least except that the percentage of increase has been greater in the winter seasons than during the summer months. All parts of the city where the public water supply has been used have alike suffered. No local epidemic has occurred; in fact, nothing has been observed, after a very searching investigation, that can in any way be charged with the cause of the increase save the discharge of the sewage of Chicago into the canal in question and hastening its flow to St. Louis by means of the Illinois River.

The evidence discloses the germs of tetanus (lock jaw) and anthrax to have been discovered in the waters of the Illinois River since the opening of the canal at Chicago.

The enormous increase in deaths and cases of typhoid in St. Louis caused by the discharge of sewage from the city of Chicago into the Mississippi has been a source of financial loss to complainant. It has been truthfully said that "The average city of 100,000 wastes perhaps half a million dollars per year on the luxury of having it." Not only is it a long, tedious and grave illness, often leaving life-long disabilities in its wake, but it is also one of the most expensive of ailments.

*500 Counting each death in the city of St. Louis caused by the * sewage from Chicago as having a value of $5,000, the loss to complainant is no small matter. While if we take into consideration the cost and expense of treating and nursing those cases wherein a recovery is had, together with the loss of labor while ill, the loss to the community reached a total of many hundred thousands of dollars per annum. This is the financial loss. The sorrows of death, pains of sickness and mental distress cannot, from the standpoint of humanity, be measured in dollars and cents.

The population residing upon the natural watershed of the Illinois River brands it as more heavily infected than that of either the Mississippi or the Missouri. Physical and atmospherical conditions also must not be overlooked.

The population upon the watershed of the Mississippi River has already burdened it with an immense sewage disposal which burden will become greater as population increases. Much trouble will soon arise in this connection, making it impossible to secure suitable water without very expensive treatment and improvement plants. The discharge of the sewage from Chicago into the drainage basin of the Mississippi has not only hastened that condition, but if not restrained, will compel St. Louis to spend many million dollars in the construction of a filter plant in order to force its typhoid mortality back to conditions similar to 1896, 1897, 1898 and 1899. The danger and damage to complainant, the menace to its welfare, the loss of its reputation as a city of comparatively low typhoid mortality and the impediment to its financial and industrial growth caused by the injury sustained and the constantly increasing embarrassing conditions manifestly convict defendants of the injuries complained of, and unquestionably warrant the decree prayed for in this case.

Much might be said of what may be expected in the future, as shown by the evidence in the case, if present conditions are permitted to become permanent.

*501 Ere long we may depend on Chicago having a population of more than 5,000,000. That city will then, to speak, be brought nearer to St. Louis, * in so far as its contaminating effect upon the water supply is concerned. The volume of the water passing through the canal will be necessarily increased, thus

hastening the flow down the river. It is not necessary, however, to look to future developments for grounds of relief, the existing conditions are amply sufficient.

The expert testimony of eminent scientists, chemists and bacteriologists shows that the principal water-borne diseases may be designated as cholera, typhoid, dysentery, anthrax and tetanus, and the result produced by *bacilli coli communis* when injected under the skin of a human being, or when lodged in the appendix producing appendicitis. Typhoid fever or *bacilli typhosis* is a common water-borne disease in this country. It is caused by crude sewage being discharged into the water supply. This fact is demonstrated by the effect of the establishment of filtration plants for the purpose of treating the water supplied for the cities of Hamburg, Germany; London, England, and Berlin, Germany, and a number of large cities in this country.

That typhoid, cholera, dysentery, anthrax and tetanus are water-borne diseases was conceded by all witnesses. In fact sanitary science has come to realize with absolute assurance that the diseases above mentioned as a general thing are caused by inferior water, or water which has been subjected to sewage pollution.

While it is practically impossible to discover or detect the physical presence of bacilli in running water, save or except as to *bacilli coli communis,* which are found in abundance in all streams in which sewage is emptied, all persons having knowledge of sanitary science, have settled beyond question that the diseases above mentioned are as a general proposition more readily communicated by means of inferior water supplied than in any other way.

In the examinations of the water of the Illinois River bacillus of tetanus and of anthrax was discovered in the water of that river. This is con-
*502 nection with *bacilli coli communis,* * which is very prevalent in the water of the Illinois, as shown by all the testimony in the case, constitutes practically the total results of the discoveries of the pathogenic bacillus in the waters of the rivers in question during this entire investigation.

A riparian population has the right to the use of a stream for drinking and other domestic uses in its natural state.

Where discharges of sewage render the water of a stream impure or infectious, the injured have a right to ask and obtain relief through the power of the courts.

Although those residing upon the stream have the right to cast their waste into the stream so long as it does not substantially interfere with the convenience, health and comfort or the business interests of those residing on the river below, yet, such right does not extend to those residing upon another watershed so as to permit such discharges or deposits by artificial means into the stream draining a different watershed.

When discharges have such effect as to render the conditions dangerous and unsanitary, the right to maintain such nuisance cannot become permanent by prescription.

The fact that others contribute to the injury constitutes no excuse or justification for the one charged to continue in the same.

The fact that riparian owners are allowed to discharge their waste and refuse into a stream so long as it does not create a substantial injury to those lower down, is merely a privilege even to the law of convenience and public policy. It is not a substantial vested right incapable of defeat.

While the privilege of depositing waste into a river by riparian owners so long as no damage or substantial injury is experienced by those living lower down may be recognized on grounds of public policy and the general law of convenience and necessity of the people, it does not necessarily license others than riparian owners to discharge waste into the stream and that too, regardless of

whether it be a substantial interference with those below the point of discharge or not.

*503 * Complainant has been materially and irreparably injured on account of the conduct of defendant in the operation of the artificial channel from Lake Michigan to the Desplaines River, and the discharge of the raw sewage into the channel and thence into the Mississippi River, defendants having no right in law to convey the sewage and infectious material of more than two millions of people from one watershed to people living upon another watershed.

Germs of infectious diseases are shown to pass from Chicago to St. Louis, and greatly injure the water of the Mississippi at St. Louis, and at all points on the Missouri shore below the mouth of the Illinois River.

The waters of the Mississippi are shown to be more heavily burdened with disease organisms and infectious material since the opening of the canal, January 17, 1900, than prior to that time, such increased infection being due to the discharge of the sewage at Chicago into the canal.

The typhoid mortality at St. Louis, on account of defendants' action, has increased annually 77.7 per cent for the period of four years since the establishment of the nuisance as compared with the four years immediately prior thereto, such increase of typhoid mortality being due to said nuisance.

Valuing each life to the extent of the annual increase of at least 80 deaths per annum for the four years at $5,000, and the loss of labor, cost of treating and nursing the additional or increased cases amounting to 1,200 (deaths multiplied by 15), occurring annually, calculated on the basis of $10 per day for loss of labor, medical treatment and nursing, it will be observed that the damage of complainant is of no trivial amount.

From the standpoint of humanity and taking into consideration mental and physical suffering, permanent disabilities and all of the disagreeable elements entering into conditions and circumstances which produce death, and taking also into consideration the fact that no one community should attempt to relieve itself from sufferings of sickness and death at the expense of a neighboring com-

*504 munity, the right and justice of this * litigation instituted, on behalf of complainant against defendant, is apparent.

The injury inflicted upon complainant is actual, substantial, continuous, immediate and irreparable.

In the presentation of the case upon the demurrer to the court, a full line of authorities was submitted upon complainant's right to institute this proceeding, entitling it to judgment if the facts set forth in the petition be established, and showing complainant's right to join both parties defendant in action. The position assumed by complainant was upheld, both as to the jurisdictional question and its right to the relief sought. 180 U. S. 208.

The undisputed evidence shows that disease-producing organisms or pathogenic bacteria are discharged from the sewers of a city into the drainage basin and when carried away by the running stream remain in the stream throughout the life of the germ or organism, unless they be sooner introduced into some human system. In this way certain diseases are communicated from one individual to another. As the population of a city upon a watershed increases, the relative number of pathogenic bacteria discharged into the river upon which the city is situated increases, and thus the water of that river is being continually increased in contamination.

The inhabitants of a large and populous city have the right to use the water of the stream upon which the city is situated in its natural condition, free from infectious material deposited into it at points above. If the discharge of infectious sewage and filth in the stream renders the water dangerous and harmful

to the people living below, such municipality or person creating the nuisance and causing the danger or damage may be enjoined from continuing the infectious discharges. 30 Am. & Eng. Ency. of Law, 2d ed., 378; *Indianapolis Waterworks Co.* v. *Strawboard Co.,* 57 Fed. Rep. 1000; *Trevett* v. *Prison Association,* 98 Virginia, 352; *Attorney General* v. *Birmingham,* 4 Kay & J. 528.

*505 The right of a city to pour into a river surface drainage * does not include the right to mix with that drainage filthy and noxious substances in such quantities that the river cannot dilute them nor safely carry them off without injury to the property of others. The latter act is, in effect, an appropriation of the bed of the river as an open sewer to carry such substances to the property of the lower proprietor and is an invasion of his property rights. *Platt* v. *Waterbury,* 77 Am. St. Rep. 335; Wood on Nuisances, 3d ed., §§ 427, 579.

Where there are several contributing causes to the pollution and infection of a water course, one cannot escape liability for those living below and using the waters for domestic purposes, because of such pollution by themselves. Eliminating from the case the fact that Chicago is situated upon the natural watershed of Lake Michigan while complainant is situated upon the natural watershed of the Mississippi, and even though it be assumed that the same rights with reference to the disposal of its sewerage belong to Chicago as to any other city upon the natural watershed of the Illinois River, it cannot be claimed by the defendants that they have the right to pollute the waters of the Mississippi because there are other cities situated upon its watershed which contribute to the pollution after or before the water reaches the Mississippi at Grafton. *Crossley* v. *Lightowler,* L. R. 2 Ch. 478; *Tennessee Coal and Iron Co.* v. *Hamilton,* 100 Alabama, 252; *Watson* v. *New Milford,* 77 Am. St. Rep. 345; Am. and Eng. Ency. of Law, 383; *Hill* v. *Smith,* 32 California, 177; *Little Schuylkill Navigation Co.* v. *Richard,* 98 Am. Dec. 211; *Ferguson* v. *Firmenich Manufacturing Co.,* 77 Iowa, 579.

The fact that Peoria, Pekin, Havana, LaSalle, Beardstown and Joliet sewer into the Illinois River, does not constitute the right of defendants to likewise discharge the sewerage from the city of Chicago into the Illinois River. *Noland* v. *New Britain,* 69 Connecticut, 668; *Wheeler* v. *Fisher Oil Co.,* 9 Ohio Dec. 294; *Jackman* v. *Arlington Mills,* 137 Massachusetts, 277; *Morgan* v. *Danbury,* 67 Connecticut, 484; *Fahnestock* v. *Feldner,* 56 Atl. Rep. 785.

*506 * The right to continue a public nuisance cannot be acquired by prescription. The fact that the Illinois and Michigan Canal was constructed many years ago for the purpose of aiding navigation, and since 1871 has been used for the purpose of partially carrying off the discharges from the stock yards in the southern part of the city of Chicago, and the fact that this canal enters the Illinois River at Peru, does not constitute a right by prescription upon the part of defendants to construct the main drainage canal in question, and operate it in the manner as charged in the bill.

The construction of the artificial channel and the discharge of Lake Michigan through it has changed conditions entirely in comparison with those which existed prior thereto. So that the fact that a certain portion of the sewage of Chicago was discharged through the Illinois and Michigan canal prior to January, 1900, does not bestow upon defendants the right either to continue therein or to construct a larger channel capable of producing, and which does produce, irreparable injury to complainant.

There can be no prescription for a public nuisance, and no length of enjoyment can legalize the continuance of a nuisance destructive to the health of the surrounding community. *Wright & Rice,* v. *Moore,* 38 Alabama, 598; *Goldsmid*

v. *Commissioners,* 1 Law. Rep. 167; *Mills* v. *Hall,* 9 Wend. 416; *Attorney General* v. *Copper Co.,* 152 Massachusetts, 452.

No length of time will legalize a nuisance. The reason of the rule to which these cases refer is, that criminality can gain no toleration in the law. The creation and maintenance of a public nuisance is punishable criminally; hence the element of criminality, which characterizes the act of creating it, should prevent the acquisition of a right to maintain it. *Commonwealth* v. *Upton,* 6 Gray, 473; *Morton* v. *Moore,* 15 Gray, 573; *New Salem* v. *Eagle Mill,* 138 Massachusetts, 8; *State* v. *Rankin,* 3 S. Car. 448; 1 Chitty on Criminal Law, 169; *Stoughton* v. *Baker,* 4 Massachusetts, 522.

*507 Although water may be permitted to run along its natural * course and the flow in its natural course may be to some extent hastened, there is, however, no right in law to hasten the flow or impose an additional volume by entering upon the servient estate using artificial channel for drainage purposes, thereby increasing the drainage area and thereby burdening the drainage facilities. 2 Farnham on Water and Water Rights, 1052; *Ward* v. *Peck,* 49 N. J. L. 42.

Such an act is a trespass which may be resisted by the injured party, and for that purpose, all the machinery of law is at his service. Farnham, 487.

Riparian owners are entitled to the usual and natural flow of water in the stream without material interference.

No one has the right to increase the volume or hasten the flow of a stream against the will and wish of lower riparian owners especially when damages or injury are likely to result. Farnham on Water, 487, 1052; *Ward* v. *Peck,* 49 N. J. L. 42; *Water Co.* v. *Bigelow,* 60 N. J. L. 201; Wood on Nuisances, 499; *Merritt* v. *Parker,* 1 Coxe, 460; *Tillotson* v. *Smith,* 32 N. H. 490; *Gerrish* v. *Manufacturing Co.,* 30 N. H. 478; *Plattsworth Co.* v. *Smith,* 57 Nebraska, 579.

For this precise case of turning a stream from its natural channel and forcing it to run in the channel of another stream, see *Merritt* v. *Parker,* 1 Coxe, 460, cited in Angell on Watercourses, 335; the French law is fully discussed in Pardessus and Servitudes, §§ 82, 85, 88. If a man's land is materially damaged by water thrown upon it by reason of the acts of another, it can make no difference what the source of the water may be; whether it be backwater, or the flowage of the same, or the water of another stream. The wrong consists in turning any water upon the land which does not naturally flow in that place: and it can make no difference if the water wrongfully turned upon a man's land against his will flows in the channel of an ancient stream, or in a course where no water flowed before, if similar damage results. *Howell* v. *McCoy,* 3 Rawle, 256; *Bealey* v. *Shaw,* 6 East Rep. 213, Ellenborough, C. J.; *Mason* v. *Hill,* 3 Barn & Adol.

*508 304, Tenterden, * C. J.; *King* v. *Tiffany,* 9 Connecticut, 162; 3 Kent's Com. 439.

It is a long established principle of the common law that wherever any act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right without proof of any specific injury. *Mellor* v. *Spateman,* 1 Wms. Saund. 346, note 2; *Woodman* v. *Tufts,* 9 N. H. 91; *Snow* v. *Cowles,* 22 N. H. 302; *Cowles* v. *Kidder,* 24 N. H. 379; *Bassett* v. *Salisbury Mfg. Co.,* 28 N. H. 455. See also *Evans* v. *Merriweather,* 38 Am. Dec. 106; *Ten Eyck* v. *Delaware Canal Co.,* 32 Am. Dec. 232; *Miller* v. *Miller,* 39 Am. Dec. 544; *Norton* v. *Valentine,* 39 Am. Dec. 220; *Elliott* v. *Fitzbury,* 57 Am. Dec. 85; *Newhall* v. *Iresom,* 54 Am. Dec 794

Complainant has the right to the use of the Mississippi River in its natural and accustomed flow. Defendants have no right to change or alter the velocity of the stream or the volume of water passing down it. By the increased volume of water discharged into the Illinois River not only is the height of the water increased, but also the velocity likewise becomes much greater, the particular dam-

age resulting to complainant in this respect being that inasmuch as the velocity of the current and the volume of water is increased, the longevity of disease-producing organisms is greatly advanced and the rapidity with which they pass from Chicago to St. Louis is largely accelerated. As shown by all of the evidence in the case, this constitutes a material and substantial, in fact, a great damage and injury to complainant. There is no contrariety of opinion that by the increase in the volume of water the life of the disease-producing organisms is greatly increased, and likewise, by the increase of the current, the distance traveled by pathogenic bacteria within their lifetime is largely extended.

The evidence shows that all the typhoid epidemics of consequence have been produced by infectious water. That at Washington in 1898, by a typhoid epidemic at Cumberland, Maryland, 175 miles up the stream; at Detroit, by
*509 typhoid * germs in the St. Clair River at the mouth of Black River, 67 miles from Detroit; at Lawrence and Newport, where the water was inducted into large reservoirs and so remained for a period of from two or three weeks, and yet preserved sufficient of the typhoid bacteria, alive and virulent, to produce the disease; at Pittsburg, by typhoidal conditions at Oil City, 113 miles above.

Cincinnati, Ohio, receives its water supply from the Ohio, and is known to be infected from the sewers of Pittsburg, more than 200 miles away; Buffalo, which obtains its water supply, practically from the mouth of Lake Erie, suffers with a high typhoid mortality caused by the sewage discharge into the lake at Cleveland and other points. Covington, Kentucky, and New Albany, Indiana, suffer severely from the disease. At these points the water is pumped into large reservoirs, where it is confined for more than 30 days, during which time it retains sufficient germs of the disease that when distributed to the consumers, typhoid conditions result. Chicago, one of the greatest typhoid-ridden cities in the United States, takes its water supply from Lake Michigan, heretofore looked upon as an acceptable source of pure water. The experience of the city, however, has demonstrated that the sewage from Chicago itself has so contaminated and infected the water of the lake at such distance from the shore so as to render it questionable whether the intakes could be extended a sufficient distances into the lake to be free from infectious material.

In view of all the unquestionable facts and circumstances presented by complainant, together with the fact that defendant discharged disease germs into the canal, coupled with the fact that there has been an increase of 77.7 per cent of the typhoid mortality in the city of St. Louis, it is apparent that pathogenic bacteria do pass from Chicago to the Mississippi River at Grafton and seriously affect the sanitary condition of complainant's water supply.

One of the most remarkable disclosures in this investigation is found
*510 by the discovery of the bacilli of anthrax and * tetanus in the waters of the Illinois River. This discovery was made by Professor Zeit in his bacteriological observations of the water since the opening of the drainage canal.

Not only has the act of defendants been damaging to the people of the city of St. Louis, which constitutes one-third of the population of complainant, but also renders unsuitable the water supply of the people residing upon the Mississippi River from a point opposite Grafton to the southern boundary line of the State.

No objection is made to the construction of the canal or of the transmission of water of Lake Michigan through it, but defendant should be restrained from discharging sewage into it or disinfect it before discharging it therein.

Nor does the fact that certain municipalities of Missouri discharge sewage into the Mississippi justify the city of Chicago for doing so through the artifi-

cial canal and thus burden the Mississippi River with an inconvenience not contemplated by nature.

Mr. James Todd for the Sanitary District of Chicago. *Mr. Howland J. Hamlin,* with whom *Mr. John G. Drennan* and *Mr. W. H. Stead* were on the brief, for the State of Illinois:

The following facts are established by the proof:

The water of the Illinois River at Grafton since the opening of the drainage canal, as disclosed by chemical and bacterial surveys covering a long period of time, is, if anything, in a better sanitary condition since the opening of the drainage canal than it was prior thereto.

The Illinois River at its mouth, from a sanitary standpoint, based upon chemical and bacterial analyses, is less polluted and less dangerous to health than is either the Missouri River or the Mississippi River, and the Illinois River, emptying into the Mississippi and Missouri Rivers, is contaminated and polluted by these two rivers, instead of contaminating and polluting the combined waters of the Mississippi and Missouri Rivers.

*511 Since the opening of the drainage canal the water of the * Illinois River has been improved for agricultural, piscatorial and manufacturing purposes by virtue of its dilution with the pure waters of Lake Michigan.

Typhoid conditions existing in the city of St. Louis, as evidenced by its public health statistics, cannot be charged, in whole or in part, to the sanitary district of Chicago.

That the water supply of St. Louis is polluted and infected defendants do not deny; but they assert that the infected material bringing about this condition is derived, not from Chicago, but from towns, villages and rural communities much nearer, in point of time, to the St. Louis intake at the Chain of Rocks.

The evidence in this case establishes affirmatively, beyond all question, that the number of deaths under the heading "Typhoid Fever" in the published reports of the Board of Health of the city of St. Louis, and as employed and used by the complainant in this controversy to establish their case that typhoid fever has increased in the city of St. Louis since January, 1900, do not correctly show the typhoid conditions existing in the city of St. Louis since 1900, or the typhoid conditions that obtained in St. Louis prior to 1900, for the reason that in the published reports of the Board of Health of the city of St. Louis there appears a column of nondescript fevers characterized under the names of intermittent, remittent, typho-malaria, congestive and simple continued fevers, and under this heading there appears a definite number of deaths attributed to these various fevers; and the evidence in this case establishes, beyond any question, that these nondescript fevers are, in reality, mainly typhoid fever, and should have been classified under the heading "Typhoid Fever," and not classified separately as distinct types of fever, and that only by uniting the deaths reported under the head of typho-malaria, etc., with those reported under typhoid fever can an approximate judgment of the true typhoid fever mortality in St. Louis be obtained; that when properly compiled and analyzed the typhoid fever

*512 statistics of the city of St. Louis, as shown in its published * Board of Health reports, do not disclose any real increase of typhoid fever, or, at most, a doubtful or a halting one, such as might be expected in a World's Fair city, with a considerable influx of population that admits of continuous sources of infection. No explosive outbursts of typhoid fever, such as characterizes water-borne epidemics, followed the opening of the drainage canal.

The evidence in this case establishes affirmatively, by a preponderance of the testimony, the following propositions:

(*a*) The typhoid germ entering the sewers of Chicago will not survive the journey to the intake tower of the city of St. Louis in a virulent condition and be able to cause typhoid fever among the inhabitants of the city of St. Louis.

(*b*) Typhoid germs from Chicago will not make the journey to the Mississippi River and become a danger and a menace to the inhabitants of the State of Missouri taking their water supply from the waters of the Mississippi River.

(*c*) That the opening of the drainage canal is not a danger and a menace, present or impending, to the inhabitants of the State of Missouri taking their water supply from the Mississippi River.

(*d*) That a typhoid germ leaving the sewers of Chicago, by way of the drainage canal, will have perished long before Grafton is reached on the Illinois River.

The necessity of purifying by filtration or other means the water supply of the city of St. Louis, as the same is derived from the Mississippi River, existed as far back as 1866, and was so recognized by the authorities in St. Louis, and has continued to be so recognized up to the present time.

The opening of the drainage canal has in no manner increased the necessity which has heretofore existed for purifying by filtration the water supply of St. Louis, and in the installation, operation and maintenance of a filtering plant sufficient to meet the requirements of St. Louis, the opening of the drainage canal has created no added cost.

*513 The evidence in this case establishes the fact conclusively * that the sewage discharged into the Missouri and the Mississippi Rivers by the cities situated within the jurisdiction of complainant is sufficient of itself to contaminate and infect the water supply of those cities in Missouri obtaining their water supply from the Missouri and Mississippi Rivers, exclusive of all other sources of contamination or pollution entering said stream.

There is no testimony offered in evidence in this case showing that any damage has been sustained by complainant, the State of Missouri, by virtue of the opening of the drainage canal, much less any that can be measured in dollars and cents.

In the prosecution of the work of the Chicago drainage canal by the defendant, the sanitary district of Chicago, at an expenditure of over $42,500,000, the complainant had knowledge of this great public improvement and has stood by in silence and acquiesced impliedly in its construction. 2 Wood on Nuisances, §§ 804–806; Gould on Waters, §§ 530, 533.

It is the well established doctrine of the Supreme Court of the United States that laches on the part of the complainant is a bar to the granting of equitable relief. This is especially so where the lack of diligence on the part of the complainant has led the defendant to place himself in a position from which he cannot escape or recede without great loss and inconvenience.

The question of laches does not depend as does the statute of limitations upon the fact, that a certain definite time has elapsed since the cause of action accrued, but whether under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. *McKnight* v. *Taylor,* 1 How. 168; *Badger* v. *Badger,* 2 Wall. 87; *Twin Lake Oil Co.* v. *Marbury,* 91 U. S. 587; *Harvard* v. *Elliot National Bank,* 96 U. S. 611; *Harwood* v. *Cincinnati & C. Air Line Co.,* 17 Wall. 79; *Apeidel* v. *Henrici,* 120 U. S. 377; *Galiher* v. *Cadwell,* 145 U. S. 368; *Hammond* v. *Hopkins,* 143 U. S. 224; *Willard* v. *Wood,* 164 U. S. 502; *Sullivan* v. *Portland &* *514 *K. R. Co.,* 94 U. S. 806; *Lansdale* * v. *Smith,* 106 U. S. 391; *Lane & B. Co.* v. *Locke,* 150 U. S. 193; *Mackall* v. *Casilear,* 137 U. S. 556; *Whitney* v. *Fox,* 166 U. S. 637; *Gildersleeve* v. *New Mexico Min. Co.,* 161 U. S. 573; *Ware*

v. *Galveston City Co.,* 146 U. S. 102; *Foster* v. *Mansfield C. & L. M. R. Co.,* 146 U. S. 88; *Hoyt* v. *Latham,* 143 U. S. 553; *Hanner* v. *Moulton,* 138 U. S. 486; *Richards* v. *Mackall,* 124 U. S. 183; *Roberts* v. *Northern P. R. Co.,* 158 U. S. 1. See also *Wilson* v. *Anthony,* 19 Barb. (Ark.) 16; *Taylor* v. *Adams,* 14 Barb. (Ark.) 62; *Johnson* v. *Johnson,* 5 Alabama, 90; *Fuson* v. *Sanger,* 2 Ware, 256; *Fisher* v. *Boody,* 1 Curtis, 219; *Cholmondy* v. *Clinton,* 2 Jac. & Walk. 141; *Smith* v. *Clay,* Ambler, 645; *Johnston* v. *Standard Mining Co.,* 148 U. S. 360.

Equity will not interfere to aid a plaintiff who has stood by in silence and has acquiesced impliedly in the expenditure of large sums of money by the defendant in the belief that his work was rightful and would never be interfered with. High on Injunctions, §§ 618, 643, 884; *Wendell* v. *Van Rensselaer,* 1 Johns. Ch. 343; *Dougrey* v. *Topping & Holme,* 4 Paige Ch. 93; *Town* v. *Needham & Harvey,* 3 Paige Ch. 546; *Blanchard* v. *Doering,* 23 Wisconsin, 200; *Sprague* v. *Steere,* 1 R. I. 247; *Patterson* v. *Hewitt,* 55 L. R A. 658, 662, 670; *Swain* v. *Seamens,* 9 Wall. 254, 273, 274; 2 Pomeroy Eq. Jur., §§ 816-821; *Niven* v. *Belknap,* 2 Johns. N. Y. 572, 588, 589; *Rochdale Canal Co.* v. *King,* 2 Simons N. S., 78; *Wood* v. *Sutcliffe,* 2 Simons (N. S.) 163; *Birmingham Canal Co.* v. *Lloyd,* 18 Ves. 515; *Ripon* v. *Hobart,* 3 Mylne & K. 169; *Barrett* v. *Blagrave,* 6 Ves. 104; *Binney's Case,* 2 Bland. Ch. 99; *Jacox* v. *Clark,* Walk. Ch. 249; *Gray* v. *Ohio & Penn. R. R.,* 1 Grant's Cases, 412; *Dunn* v. *Sprevier,* 7 Ves. 235; *Bassett* v. *Company,* 47 N. H. 426; *Bliss* v. *Pritchard,* 67 Missouri, 181, 190; *Landrum* v. *Union Bank,* 63 Missouri, 48. See also *Eston* v. *N. Y. & L. B. R. R.,* 24 N. J. Eq. 49.

The court of equity will refuse to grant an injunction when it appears that greater injury and inconvenience will be caused to the defendant by granting the injunction than will be caused to the complainant by refusing it.

*515 * The courts will require a very strong case for the granting of an injunction which will cause more injury than it will remedy, and it may be said, as a general rule, that an injunction will not be granted where it will be productive of greater injury than will result from a refusal of it. This rule is especially applicable when the party applying for an injunction has by his own laches made it impossible to grant the injunction without inflicting serious injury on the party so to be enjoined. 16 Am. & Eng. Ency. of Law, 2d ed., 363, 364; Spelling on Extraordinary Relief, §§ 23, 372; *Edwards* v. *Allonez Mining Co.,* 38 Michigan, 46; *Clifton* v. *Dye,* 87 Alabama, 468; *Richard's Appeal,* 57 Pa. St. 114; *Hall* v. *Rood,* 39 Michigan, 46; *Campbell* v. *Seaman,* 63 N. Y. 568.

A court of equity will not grant an injunction to restrain a party from committing a nuisance when the evidence shows that the party complaining is guilty of contributing to the nuisance of which he complains. If the granting of an injunction will not relieve him from the consequences of his own acts the injunction will not issue. If the complainant contributes to the conditions which it claims in its bill of complaint will injure it as a State, it cannot obtain equitable relief.

It is the fundamental principle of equity that "He who seeks equity must do equity," and out of this grows the maxim that "He who comes into equity must come with clean hands." In other words, courts of equity will not enjoin one from doing a lawful act upon the application of one who, while claiming said act will cause him great and irreparable injury, is himself contributing to the injurious condition complained of. In such case the parties are *in pari delicto.* 11 Paige Ch. 349.

If the plaintiff himself has contributed to the pollution he cannot recover against an upper proprietor. Gould on Waters, § 219; *Water Supply Co.* v. *Potwin,* 43 Kansas, 408; *Ferguson* v. *Firmenich Mfg. Co.,* 77 Iowa, 576. See

also *Cassady* v. *Cavenor,* 37 Iowa, 300; *Richards* v. *Waupun,* 59 Wisconsin,
*516 45; *Mowday* v. *Moore,* 133 Pa. St. 598; *Comstock* v. *Johnson,* 46 * N. Y.
615; *Palmer* v. *Harris,* 60 Pa. St. 156; *Jacksonville* v. *Doane,* 145 Illinois. 23.

The cities, towns and villages in the State of Missouri, situated upon the shore of the Missouri River, which are contributing to the nuisance complained of in this suit, are all agencies of the State; their acts in so contributing will be imputed to the State, and it should not be given relief from a condition to which its agencies are so materially contributing.

An injunction to restrain a nuisance will issue only in a case where the fact of nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding the injunction, and where interposition by injunction is sought to restrain that which is apprehended will create a nuisance of which its complainant may complain, the proof must show such a state of facts as will manifest the danger to be real and immediate.

A careful consideration of all the testimony fails to establish as a fact that the opening of the drainage canal is a nuisance, causing complainant great and irreparable injury. The contention made by complainant has not been made out upon determinate and satisfactory evidence. The evidence is conflicting and the injury doubtful, and consequently complainant is not entitled to the relief prayed for. The evidence establishes affirmatively that Missouri, as a State, is not injured or damaged by virtue of the opening of the Chicago drainage canal, but on the contrary, if there has been an injury established in the evidence in this case as suffered by the inhabitants of the State of Missouri from the use of the waters of the Mississippi River, that injury has been caused by the inhabitants of the cities, towns and villages within the jurisdiction of complainant who have emptied their sewage into the Missouri and Mississippi Rivers at points above the places where the alleged injury is supposed to have existed. The evidence upon which damage is predicated is speculative and theoretical, and insuffi-
*517 cient to show that the opening of the * Chicago drainage canal is responsible for the injury complained of.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the State of Missouri to restrain the discharge of the sewage of Chicago through an artificial channel into the Desplaines River, in the State of Illinois. That river empties into the Illinois River, and the latter empties into the Mississippi at a point about forty-three miles above the city of St. Louis. It was alleged in the bill that the result of the threatened discharge would be to send fifteen hundred tons of poisonous filth daily into the Mississippi, to deposit great quantities of the same upon the part of the bed of the last-named river belonging to the plaintiff, and so to poison the water of that river, upon which various of the plaintiff's cities, towns and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing, purposes. It was alleged that the defendant Sanitary District was acting in pursuance of a statute of the State of Illinois and as an agency of that State. The case is stated at length in 180 U. S. 208, where a demurrer to the bill was overruled. A supplemental bill alleges that since the filing of the original bill the drainage canal has been opened and put into operation and has produced and is producing all the evils which were apprehended when the injunction first was asked. The answers deny the plaintiff's case, allege that the new plan sends the water of the Illinois

River into the Mississippi much purer than it was before, that many towns and cities of the plaintiff along the Missouri and Mississippi discharge their sewage into those rivers, and that if there is any trouble the plaintiff must look nearer home for the cause.

The decision upon the demurer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if
*518 the plaintiff should prove its case. That was left to the future * with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful and that the danger must be shown to be real and immediate. The nuisance set forth in the bill was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt. But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence is to be approached.

The first question to be answered was put in the well known case of the Wheeling bridge. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 518. In that case, also, there was a bill brought by a State to restrain a public nuisance, the erection of a bridge alleged to obstruct navigation, and a supplemental bill to abate it after it was erected. The question was put most explicitly by the dissenting judges but it was accepted by all as fundamental. The Chief Justice observed that if the bridge was a nuisance it was an offence against the sovereignty whose laws had been violated, and he asked what sovereignty that was. 13 How. 581; Daniel, J., 13 How. 599. See also *Kansas* v. *Colorado,* 185 U. S. 125. It could not be Virginia, because that State had purported to authorize it by statute. The Chief Justice found no prohibition by the United States. 13 How. 580. No third source of law was suggested by any one. The majority accepted the Chief Justice's postulate, and found an answer in what Congress had done.

*519 It hardly was disputed that Congress could deal with the * matter under its power to regulate commerce. The majority observed that although Congress had not declared in terms that a State should not obstruct the navigation of the Ohio, by bridges, yet it had regulated navigation upon that river in various ways and had sanctioned the compact between Virginia and Kentucky when Kentucky was let into the Union. By that compact the use and navigation of the Ohio, so far as the territory of either State lay thereon, was to be free and common to the citizens of the United States. The compact, by the sanction of Congress, had become a law of the Union. A state law which violated it was unconstitutional. Obstructing the navigation of the river was said to violate it, and it was added that more was not necessary to give a civil remedy for an injury done by the obstruction. 13 How. 565, 566. At a later stage of the case, after Con-

gress had authorized the bridge, it was stated again in so many words that the ground of the former decision was that "the act of the Legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law." 18 How. 421, 430.

In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that State's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must
*520 be governed by rules explicitly * or implicitly recognized. *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 737. It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new. Take the question of prescription in a case like the present. The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent state. See 1 Oppenheim, International Law, 293, §§ 242, 243. It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long, *Davis* v. *Mills,* 194 U. S. 451, 457, yet the fixing of a definite time usually belongs to the legislature rather than the courts. The courts did fix a time in the rule against perpetuities, but the usual course, as in the instances of statutes of limitation, the duration of patents, the age of majority, etc., is to depend upon the lawmaking power.

It is decided that a case such as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a State
*521 upon a navigable river like the Danube, which would * amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in

the same jurisdiction equally would warrant an interference by this court with the action of a State. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between States.

The nearest analogy would be found in those cases in which an easement has been declared in favor of land in one State over land in another. But there the right is recognized on the assumption of a concurrence between the two States, the one, so to speak, offering the right, the other permitting it to be accepted. *Manville Co.* v. *Worcester,* 138 Massachusetts, 89. But when the State itself is concerned and by its legislation expressly repudiates the right set up, an entirely different question is presented.

Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. See *Kansas* v. *Colorado,* 185 U. S. 125.

As to the principle to be laid down the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into
*522 the river is * general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals some consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights. *St. Helen's Smelting Co.* v. *Tipping,* 11 H. L. C. 642. See *Boston Ferrule Co.* v. *Hills,* 159 Massachusetts, 147, 150. Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame.

We have studied the plaintiff's statement of the facts in detail and have perused the evidence, but it is unnecessary for the purposes of decision to do more than give the general result in a very simple way. At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois River in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said, without

evil results. The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has
*523 increased considerably since the change and that other explanations * have been disproved, and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.

We assume the now prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward, and the cases which are produced are controverted. The plaintiff obviously must be cautious upon this point, for if this suit should succeed many others would follow, and it not improbably would find itself a defendant to a bill by one or more of the States lower down upon the Mississippi. The distance which the sewage has to travel (357 miles) is not open to debate, but the time of transit to be inferred from experiments with floats is estimated at varying from eight to eighteen and a half days, with forty-eight hours more from intake to distribution, and when corrected by observations of bacteria is greatly prolonged by the defendants. The experiments of the defendants' experts lead them to the opinion that a typhoid bacillus could not survive the journey, while those on the other side maintain that it might live and keep its power for twenty-five days or more, and arrive at St. Louis. Upon the question at issue, whether the new discharge from Chicago hurts St. Louis, there is a categorical contradiction between the experts on the two sides.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places. We give them mainly from the plaintiff's brief: 1890, 140; 1891, 165; 1892, 441; 1893, 215; 1894, 171; 1895, 106; 1896, 106; 1897, 125; 1898, 95; 1899, 131; 1900, 154; 1901, 181; 1902, 216; 1903, 281.
*524 It is argued for the defendant that the numbers * for the later years have been enlarged by carrying over cases which in earlier years would have been put into a miscellaneous column (intermittent, remittent, typho-malaria, etc., etc.), but we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause.

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected. But the plaintiff relies upon proof that such bacilli are discharged into the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the *bacillus coli communis,* which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference. To prove that the typhoid bacillus could make the journey an experiment was tried with the *bacillus prodigiosus,*

which seems to have been unknown, or nearly unknown, in these waters. After preliminary trials, in which these bacilli emptied into the Mississippi near the mouth of the Illinois were found near the St. Louis intake and in St. Louis in times varying from three days to a month, one hundred and seven barrels of the same, said to contain one thousand million bacilli to the cubic centimeter, were put into the drainage canal near the starting point on November 6, and on December 4 an example was found at the St. Louis intake tower. Four others were found on the three following days, two at the tower and two at the mouth of the Illinois. As this bacillus is asserted to have about the same length of life in sunlight in living waters as the *bacillus typhosus,* although it is a little more hardy, the experiment is thought to prove one element of the plaintiff's
*525 case, although * the very small number found in many samples of water is thought by the other side to indicate that practically no typhoid germs would get through. It seems to be conceded that the purification of the Illinois by the large dilution from Lake Michigan (nine parts or more in ten) would increase the danger, as it now generally is believed that the bacteria of decay, the saprophytes, which flourish in stagnant pools, destroy the pathogenic germs. Of course the addition of so much water to the Illinois also increases its speed.

On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through they would be scattered and enfeebled and would do no harm. The defendant also sets against the experiment with the *bacillus prodigiosus* a no less striking experiment with typhoid germs suspended in the Illinois River in permeable sacs. According to this the duration of the life of these germs has been much exaggerated, and in that water would not be more than three or four days. It is suggested, by way of criticism, that the germs may not have been of normal strength, that the conditions were less favorable than if they had floated down in a comparatively unchanging body of water, and that the germs may have escaped, but the experiment raises at least a serious doubt. Further, it hardly is denied that there is no parallelism in detail between the increase and decrease of typhoid fever in Chicago and St. Louis. The defendants' experts maintain that the water of the Missouri is worse than that of the Illinois, while it contributes a much larger proportion to the intake. The evidence is very strong that it is necessary for St. Louis to take preventive measures, by filtration or otherwise, against the dangers of
*526 the * plaintiff's own creation or from other sources than Illinois. What will protect against one will protect against another. The presence of causes of infection from the plaintiff's action makes the case weaker in principle as well as harder to prove than one in which all came from a single source.

Some stress was laid on the proposition that Chicago is not on the natural watershed of the Mississippi, because of a rise of a few feet between the Desplaines and the Chicago Rivers. We perceive no reason for a distinction on this ground. The natural features relied upon are of the smallest. And if under any circumstances they could affect the case, it is enough to say that Illinois brought

Chicago into the Mississippi watershed in pursuance not only of its own statutes, but also of the acts of Congress of March 30, 1822, c. 14, 3 Stat. 659, and March 2, 1827, c. 51, 4 Stat. 234, the validity of which is not disputed. *Wisconsin* v. *Duluth*, 96 U. S. 379. Of course these acts do not grant the right to discharge sewage, but the case stands no differently in point of law from a suit because of the discharge from Peoria into the Illinois, or from any other or all the other cities on the banks of that stream.

We might go more into detail, but we believe that we have said enough to explain our point of view and our opinion of the evidence as it stands. What the future may develop of course we cannot tell. But our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause.

Bill dismissed without prejudice.[1]

State of Louisiana v. State of Mississippi.

Supreme Court of the United States, 1906.

[202 *United States*, 1.]

The act of Congress admitting Louisiana having given that State all islands within three leagues of her coast, and the subsequent act of Congress admitting Mississippi having purported to give that State all islands within six leagues of her shore, and some islands within nine miles of the Louisiana coast being also within eighteen miles of the Mississippi shore, although the apparent inconsistency is reconcilable, the basis of a boundary controversy involving to each State pecuniary values of magnitude, exists; and such a controversy between the two States in their sovereign capacity as States and having a boundary line separating them justifies the exercise of the original jurisdiction of this court.

As the act admitting Mississippi was passed five years after the act admitting Louisiana, Congress could not take away any portion of Louisiana, and give it to Mississippi. Section 3, Art. IV of the Constitution does not permit the claims of any particular State to be prejudiced by the exercise of the power of Congress therein conferred.

Acts of Congress passed at different times for the admission of different States where their respective subjects are not identical with or similar to each other do not form part of a homogeneous whole, of a common system, so as to allow a claimant under the later act to claim that it changed the earlier act by construction, and the rule of *in pari materia* does not apply.

*2 * The term *thalweg* is commonly used by writers on international law, in the definition of water boundaries between States, meaning the middle or deepest or most navigable channel and while often styled "fairway" or "midway" or "main channel"; the word has been taken over into various languages and the doctrine of the *thalweg* is often applicable in respect of water boundaries to sounds, bays, straits, gulfs, estuaries and other arms of the sea, and also applies to boundary lakes and land-locked seas whenever there is a deep water sailing channel therein.

The "maritime belt" is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States.

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[1] For the final phase of this case see *Missouri* v. *Illinois* (202 U. S. 598), *post*, p. 1517.—Editor.

As between the States of the Union long acquiescence in the assertion of a particular boundary, and the exercise of sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule may be in respect of the acquisition by prescription of large tracts of country claimed by two States.

The real, certain and true boundary south of the State of Mississippi and north of the southeast portion of the State of Louisiana, and separating the two States in the waters of Lake Borgne, is the deep water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass between Cat Island and Isle à Pitre to the Gulf of Mexico.

THE State of Louisiana by leave of court filed her bill against the State of Mississippi, October 27, 1902, to obtain a decree determining a boundary line between the two States and requiring the State of Mississippi to recognize and observe the line so determined.

The bill alleged:

"1st. That the State of Louisiana was admitted into the Union of the United States of America by the act of Congress, found in chapter 50 of the United States Statutes at Large, volume 2, page 701, approved April 6th, 1812, and therein the boundaries of the said State of Louisiana, in the preamble of said act, were described as follows:

" 'Whereas, the representatives of the people of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the 30th day of April, 1803, between the United States and France contained within the following limits, that is to say: Beginning at the mouth of the
*3 * river Sabine, thence by a line drawn along the middle of said river, including all islands to the 32d degree of latitude; thence due north to the northernmost part of the 33d degree of north latitude; thence along the said parallel of latitude to the Mississippi river; thence down the said river to the river Iberville, and from thence along the middle of said river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico; thence bounded by said gulf to the place of beginning, including all islands within three leagues of the coast,' etc.

"2d. That according to the foregoing description, the eastern boundary of the State of Louisiana was formed by the Mississippi river, beginning at the northeast corner of said State and extending south to the junction of the said river, with the river Iberville (now known as Bayou Manchac) and thence extending eastwardly through the lower end of the Amite river, through the middle of Lake Maurepas, Pas Manchac, and Lake Pontchartrain, and in order to reach the Gulf of Mexico its only course was through the Rigolets, into Lake Borgne, and thence by the deep water channel through the upper corner of Lake Borgne, following said channel, north of Half Moon Island, through Mississippi Sound to the north of Isle à Pitre, through the Cat Island channel, southwest of Cat Island, into the Gulf of Mexico, which said eastern boundary of the State of Louisiana is more fully shown on diagram No. 1, made part of this bill;

"3d. That by the act of Congress, found in the United States Statutes at Large, vol. 2, p. 708, chapter 57, approved April 14th, 1812, additional territory was added to the then existing State of Louisiana, which additional territory was described in the following language:

"'Beginning at the junction of the river Iberville with the Mississippi river; thence along the middle of the Iberville and of the river Amite and Lakes Maurepas and Pontchartrain to the eastern mouth of Pearl river; thence up the eastern branch of the Pearl river to the 31st degree of north latitude; thence along
*4 the said degree of latitude to the river Mississippi; thence * down the said river to the place of beginning, shall become and form a part of the State of Louisiana;'

"4th. That the effect of this legislation, as to the eastern boundary of the State of Louisiana, was to retain the Mississippi river as the original eastern

DIAGRAM NO. 1.

boundary, as far south as the 31st degree of north latitude. The change then moved the eastern boundary eastward along the 31st degree of north latitude to the Pearl river, whence it then ran south down the said river, through its eastern branch, till it entered the northern corner of Lake Borgne, where the State's eastern boundary then joined and followed the boundary line originally
*5 fixed in the act of April 6th, 1812, and followed, as heretofore stated, * the deep water channel through the upper corner of Lake Borgne, north of Half Moon Island, eastward through the deep water channel along the Mississippi Sound till it reached the Cat Island channel north of Isle à Pitre, and southwest of Cat Island, whence passing through Chandeleur Sound, northeast of Chandeleur Islands, it entered the Gulf of Mexico, and ran south around the

delta of the Mississippi river and then north and westward to the point where the Sabine river enters the Gulf of Mexico, as will be more fully seen from the diagram No. 2, made part of this bill;

DIAGRAM No. 2.

"5th. That the territory lying adjacent to, and to the eastward of the
*6 State of Louisiana is the State of Mississippi, which * latter State was admitted into the Union of the United States of America by the act of Congress, found in the United States Statutes at Large, volume 3, chapter 23, page 348, approved March 1st, 1817, whereby the inhabitants of the western part of the then Mississippi Territory were authorized to form for themselves a state constitution and to be admitted into the Union, the boundaries of the then to be created State being described as follows:

"Beginning at the river Mississippi at a point where the southern boundary line with the State of Tennessee strikes the same; thence along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line to the northwest corner of the county of Washington (Alabama); thence due south to the Gulf of Mexico; thence westwardly, including all islands within six leagues of the shore to the most southern junction of Pearl river with Lake Borgne; thence up said river to the 31st degree of north latitude; thence west along said degree of latitude to the Mississippi river; thence up the same to the beginning.

"6th. That by the said act, Congress intended that the southern boundary line of the State of Mississippi, beginning at the point dividing it from the State

of Alabama, should run westwardly till it joined the Louisiana eastern boundary line, and that in doing so, the said southern boundary would in effect start westward from a point eighteen miles south of the coast line, and include in its westwardly direction the western end of Petit Bois Island, all of Horn Island, Ship Island and Cat Island, and the smaller islands north of these, those islands being the ones contemplated in the act of Congress, as being within eighteen miles of the southern coast line of Mississippi, and that the said southern boundary of Mississippi, extending in its westwardly direction through the Gulf of Mexico, would gradually approach the coast line, and meet the eastern boundary line of Louisiana, just as the said eastern boundary line of Louisiana emerges from the Cat Island channel into the Gulf of Mexico, and thence follow and become the same as the * Louisiana boundary line extending westerwardly

*7

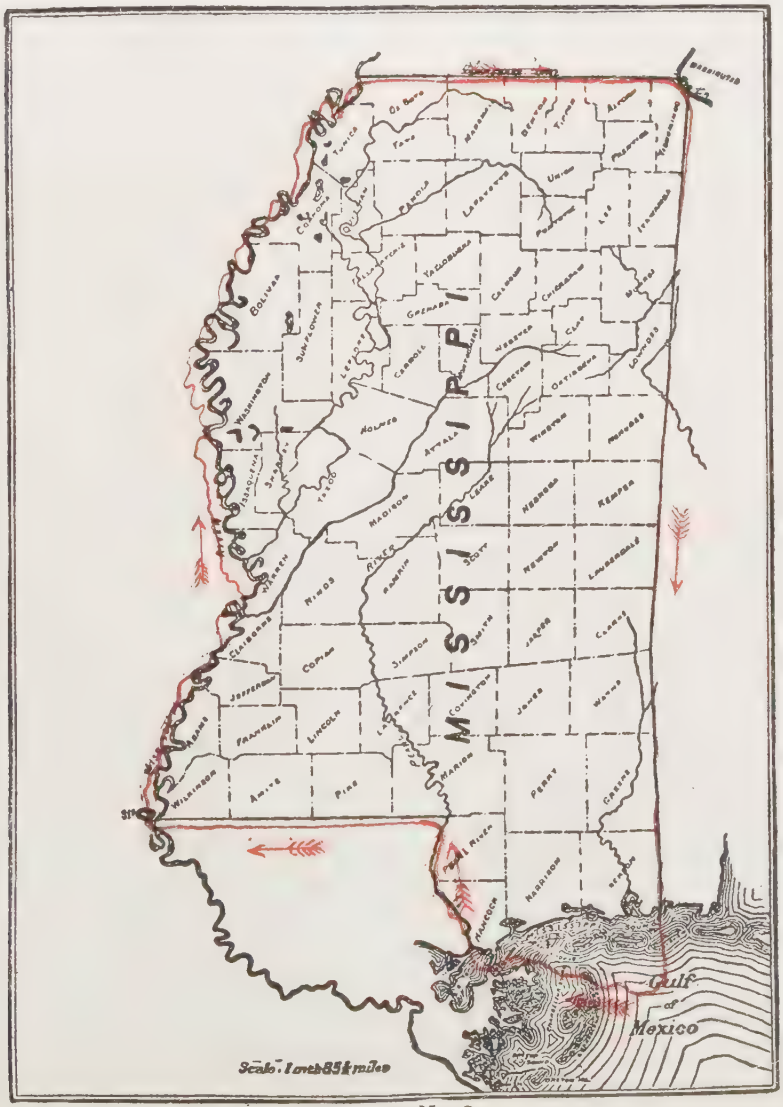

DIAGRAM NO. 3.

to the south of Cat Island, through Mississippi Sound to the north of Half
*8 Moon or Grand Island to the most southern junction of the * east branch of Pearl river with Lake Borgne, being identical with the Louisiana eastern boundary, and thence extending up the channel of Pearl river;

"7th. That the islands included between the shore line and the southern boundary of the State of Mississippi are the islands heretofore described, viz: the western end of Petit Bois Island, with all of Horn Island, Ship Island and Cat Island, and the small islands north of them, those islands being large, and well known to Congress at the time of the passage of the act, all of which islands and the southern boundary of the State of Mississippi will more fully appear from the diagram No. 3, made a part of this bill;

"8th. That the islands contemplated in the act of Congress of 1812, creating the State of Louisiana, and intended to be embraced within the State of Louisiana, as provided by the clause, 'Thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast,' were all of the other islands, except those heretofore named as going to the State of Mississippi, as all other islands, and all other mainland, are south and west of the boundary line thus passing from Pearl river through the deep water channels in Lake Borgne, and Mississippi Sound, through the deep water channel, southwest of Cat Island to the eastward of the Chandeleur Islands, and thence south, taking in the delta of the Mississippi river, and extending westward along the Gulf coast, including all islands along the coast, to the Sabine river, where the State of Louisiana is thence bounded on the westward by the State of Texas, all of which will more fully appear from diagram No. 2, heretofore referred to;

"9th. Now your orator avers that there has developed in recent years in the waters south of the State of Mississippi and east of the southern portion of the State of Louisiana a considerable growth of oysters, and an industry of large proportions, in the handling of the said bivalves, either in their fresh or in a canned condition, has resulted therefrom;

*9 "10th. That the State of Mississippi has, by legislative * enactments, regulated the oyster industry in the waters of said State, and permits the dredging of oysters on the natural oyster reefs in waters of the said State, as will more fully appear from the statutes of said State to which reference is made;

"11th. That the State of Louisiana has by legislative enactments regulated the oyster industry in the said State of Louisiana, and prohibits the dredging of oysters on the natural reefs in the waters of said State, as will more fully appear from the statutes of said State to which reference is made;

"12th. That the provisions of the laws of the said two States differ considerably in many other respects;

"13th. That the existence and location of the natural oyster reefs in the waters of the parish of St. Bernard in the State of Louisiana which adjoins the State of Mississippi is shown by the map made from a reconnaissance by the United States Fish Commission steamer 'Fish Hawk,' in February, 1898, as will more fully appear from diagram No. 4, now made part of this bill;

"14th. Now your orator avers that the boundary line dividing the two States in the waters thereof has been clearly defined by the acts of Congress creating the States of Louisiana and Mississippi, as will be seen from the diagram No. 5, made up from the boundary descriptions taken from the acts of Congress

APPROXIMATE LOCATION
of the

OYSTER BEDS
OF ST. BERNARD PARISH
LOUISIANA.

From a reconnaissance
made by the U.S. Fish Commission Steamer, Fish Hawk
Lieut. Franklin Swift U.S.N., Commanding.
Feb. 1898.

Scale.

Note.
The Soundings are shown in black and give depths in feet.
Densities are shown in blue figures.
Dense growths of oysters are shown, thus:
Scattered " " " " "
Very " " " " "

LAKE BORGNE
to
ST. JOSEPH LIGHT

Lower Point Claire

St. Joseph Id.

Round I.

Malheureux Pt.

LE PETIT PASS

MISSISSIPPI SOUND

Morrill Cut Off

CAT I. LIGHT

Pilots Bank

Porpoise Shoal

South Shell Bank Flats

Shell Banks

Deep Water Pt.

DRAIN

Rabbit Bayou

South Bayou

Three Mile Bayou

Three Mile Bay

Johnson Bay

Pelican Point

Nigger Pt.

Little Raccoon I.

West Deadman

Kerako Bay

False Mouth Bay

Three Mile Pt.

Chino Bay

Deep Pass

Elephant Point Pass

Treasure

Indian

Mound

Bay

Chimney Bayou

Dark Bayou

LIVE OAK BAY

Sam Holmes

CALIFORNIA BAY

MARTIN ISLAND

SCOW

Chimney Bay

Sand Key

creating the said States of Louisiana and Mississippi, which diagram is also made part of this bill;

"15th. That the said boundary line in the waters between said States has never been designated by buoys or marks of any kind by either State, nor designated in any manner, except by the United States Government in so far as it has buoyed the deep water channel, extending from the mouth of the Pearl river through the upper corner of Lake Borgne north of Half Moon Island, eastward to the Cat Island Pass, north of Isle à Pitre, and southwest of Cat Island, which buoys were placed by the Coast Survey of the United States Government;

"16th. That owing to the differences in the laws of the States of
*10 Louisiana and Mississippi, regulating the oyster industry of * the respective States, the said statutes providing penalties for the violation thereof,

DIAGRAM NO. 5.

much confusion has resulted and a great public demand has arisen in Louisiana to definitely mark the boundary line dividing the two States in the waters thereof;

that citizens of the State of Mississippi, in violation of the laws of the
*11 State of Louisiana, have been fishing oysters with dredges * on the natural reefs in the waters of the State of Louisiana, said fishermen claiming that they were in the waters of the State of Mississippi and consequently not violating the laws of the State of Louisiana."

The bill then set forth that "to avoid an armed conflict between the sheriff and officers of the parish of St. Bernard in the State of Louisiana, and the sheriff and officers of the county of Harrison in the State of Mississippi," a meeting of citizens of Louisiana was called by the Governor of that State, which met in New Orleans, and resulted in the appointment by the Governor of commissioners on the part of Louisiana "to consider the determination of the water boundary line between the two States, and arrange for its easy location and identification by a proper system of buoys," and to request that the Governor of Mississippi appoint like commissioners on the part of that State, which appointment was made.

The joint commission met and considered the subject, and subsequently the Mississippi commission reported its inability to agree with the Louisiana commission, stating, among other things, "It is apparent that the only hope of settlement is a friendly suit in the Supreme Court of the United States, and we respectfully suggest that course."

The bill continued:

"24th. That the eastern water boundary line as claimed by your orator, viz: a line beginning at the most southern junction of the channel of the east branch of the Pearl river with Lake Borgne and thence eastward following the deep water channel to the north of Half Moon Island, through the Mississippi Sound channel, to Cat Island Pass, northeast of Isle à Pitre into the Gulf of Mexico, thereby dividing the waters between the two States, agrees, and is in accord, with the acts of Congress creating respectively the State of Louisiana and the State of Mississippi as already shown by diagram No. 5; that any other boundary than the deep water channel as aforesaid would cause the limits of the two States to conflict and overlap, and that it is not to be presumed that the Congress
*12 of the United States * intended to, or would, establish, in its description, a boundary for the State of Mississippi, conflicting with the already existing Louisiana eastern boundary, when there is a construction of the wording of the two acts, in fact the only construction that suggests itself, that shows a boundary readily ascertained, harmonizing with the words of the acts as they now read, and clearly defining the limits of the two States in the waters between them.

"25th. Your orator further avers that the use of the word 'westwardly' in the description of the southern boundary of the State of Mississippi, as that southern boundary line extends westwardly from the Alabama state line to the Louisiana eastern boundary line, shows that it was not the intention of Congress to have it run direct or due west throughout the whole course, and that it was evidently the intention of Congress, in giving to the State of Mississippi the islands north of that westwardly drawn line, that the eighteen-mile limit shall gradually decrease as it approached the Louisiana line on the east till it met and followed it to its source. If the Mississippi line ran parallel to the southern coast of Mississippi, at a distance of eighteen miles from such coast line following

the meander of the coast, and thence joined at right angles a line emerging from the mouth of Pearl river, such line would not only include Grassy, Half Moon, Round, Le Petit Pass Islands and Isle à Pitre, already belonging to Louisiana as being within nine miles or three leagues of the Louisiana shore line, but such line would also include part of the mainland of the State of Louisiana as will be seen from the following diagram (No. 6) made a part of this bill and it certainly could not have been the intention of Congress to take away from the State of Louisiana any islands or mainland already belonging to it and to give them to the State of Mississippi, as such a proceeding, without the consent of the legislature of the State of Louisiana, would be a violation of sec. 3 of art. IV of the Constitution of the United States.

*13 "26th. Your orator avers that the marsh lands claimed by * the State of Mississippi to be islands are in truth, with the exception of the Isle à Pitre, Grassy, Half Moon, Round and Le Petit Pass Islands, low lying marsh lands forming part of the mainland of the State of Louisiana; that said swamp or marsh lands and islands have been known as and called since time immemorial 'the Louisiana marshes;' that they were approved to the State of Louisiana by the Commissioner of the General Land Office on May 6, 1852, as will appear from a certified copy of said record of approval from the United States Land Office made a part of this bill, marked Exhibit (G,) and where not since sold by the State of Louisiana to private purchasers have always stood on the books of the register of the Louisiana state land office as state lands, to be offered for sale, until recently transferred by the State of Louisiana to the board of commissioners for the Lake Borgne basin levee district by the provisions of act No. 14 of the legislature of the State of Louisiana for the year 1892, for the purpose of enabling the said levee board, by the proceeds of sale of said lands to secure the funds to aid in the building of levees in that levee district, to protect the lands from overflow.

"27th. That parts of said disputed territory claimed by the State of Mississippi to be islands within eighteen miles of its shore line are in fact part of the mainland of the State of Louisiana, and therefore belong to and form part of said State of Louisiana, but if your honors should feel that any part of this disputed area was islands by reason of the presence of shallow water, then as islands they are within the nine-mile limit of distance from the shore line of the State of Louisiana and therefore belong to and form part of the State of Louisiana by that second provision of the act of Congress giving Louisiana all islands within three leagues of its shore line.

"28th. Your orator further avers that where contiguous States or countries are separated by water it is, and always has been, the custom to regard the channel as establishing the boundary line of such States, and that the State *14 of Mississippi has itself recognized this principle in the description of * its territorial limits as found in the second article of its own constitution adopted November, 1890, in the following words:

* * * * * * * * * * *

"29th. Your orator avers that as heretofore stated the Congress of the United States, as well as the various departments of the United States Government having authority in the premises, have themselves recognized the boundary line contended for by the State of Louisiana by reason of the fact that the United States Government has confirmed to the State of Louisiana the lands composing

Half Moon Island which is just south of the deep water channel," [by sections and townships as set forth,] and also "the lands forming what is commonly known as Isle à Pitre," [by sections and townships as stated,] all of them "recognized as belonging to and forming part of the State of Louisiana by the said United States Government and have always heretofore been so recognized by the people of the said two States; that the lands forming the Isle à Pitre were sold by the State of Louisiana," &c., &c., "and said lands have been assessed on the assessment rolls of the parish of St. Bernard, State of Louisiana, and taxes thereon have been paid to the State of Louisiana for the past 35 years, and said lands have never been assessed on the rolls of, nor have any taxes ever been paid to, the State of Mississippi and that this is the case with all other lands and islands now claimed by the State of Mississippi, but which in truth and fact belong to the State of Louisiana.

"30th. Your orator therefore further avers that all constituted authorities competent to create, adopt or consider the said boundary line have declared the water boundary line claimed by the State of Louisiana, viz: the deep water channel running from the most southern junction of the eastern mouth of Pearl river, through Lake Borgne, north of Half Moon Island, through Mississippi Sound, north of Isle à Pitre and southwest of Cat Island, through Cat Island Pass, through Chandeleur Sound northeast of Chandeleur Islands, to the
*15 Gulf * of Mexico, to be the true water boundary between the said States."

The bill prayed that it be adjudged and decreed "that the boundary line dividing the States of Louisiana and Mississippi, in the waters between the said States to the south of the State of Mississippi and to the southeast of the State of Louisiana is the deep water channel, commencing at the most southern junction of the eastern mouth of Pearl river with Lake Borgne, thence by the deep-water channel through Lake Borgne, north of Half Moon Island, through Mississippi Sound, north of Isle à Pitre, through Cat Island Pass Channel, southwest of Cat Island, through Chandeleur Island Sound, northeast of the Chandeleur Islands, to the Gulf of Mexico, as is delineated on the original map submitted by the Louisiana Boundary Commission to the Mississippi Boundary Commission and now made part of this bill, marked Exhibit 'E;' that the said deep water channel be located throughout its course and permanently buoyed at the joint expense of the two States; that the State of Mississippi and its citizens be perpetually enjoined from disputing the sovereignty and ownership of the State of Louisiana in the said land and water territory south and west of said boundary line," and for costs and general relief.

[Exhibit "E" is not reproduced in the printed record, but is to be found in the Louisiana Atlas of Maps, p. 60. It consists of Coast Survey Charts Nos. 189, 190 and 191, showing the coast from Mobile to Lakes Borgne and Pontchartrain, with boundary lines added in red ink. The maps given in this statement are sufficient to supply the lack of this particular exhibit.]

The State of Mississippi, by leave, filed a demurrer to the bill, which was by stipulation submitted to the consideration of the court on printed arguments, and was subsequently overruled.

Thereupon the State of Mississippi on leave filed her answer and cross bill.
*16 * The State denied articulately nearly every material allegation of the bill and therefore the accuracy of the diagrams or maps attached thereto, and asserted the true boundary to be as set forth in her cross bill. And while she

admitted "that the deep water channel out of the mouth of Pearl river through the upper course of Lake Borgne and on into the Gulf, as stated in the bill, has been marked by buoys by and under the direction of the United States Government for navigation and commercial purposes," she denied "that said marking of the deep water channel was ever intended to fix in any manner whatsoever any part of the boundary line between said States," and further denied "the correctness of complainant's statement that where contiguous States or countries are separated by water, the channel of the waters dividing said States constitutes a boundary line, and defendant specifically denies that such rule is applicable to this case."

The cross bill averred that the southern boundary line of the State of Mississippi was fixed by the act of Congress, approved March 1, 1817, 3 Stat. 348, c. 23, § 2.

That by that act Mississippi was given "all lands under the waters south of her well-defined shore line to the distance of six leagues from said shore at every point between the Alabama line and the most eastern junction of Pearl river with Lake Borgne, including all islands within said limit," and "all territory within said limits, not being a part of the mainland of the State of Louisiana, became, was and is a part of the territory of the State of Mississippi."

That the acts of 1812, creating the State of Louisiana, failed "to describe the water line from the most eastern mouth of Pearl river to the Gulf of Mexico," and hence Louisiana proposed, "without authority in law to follow the deep water channel from the mouth of Pearl river to the Gulf of Mexico, that is, as far south as that point in the sea where the waters of Chandeleur Sound merge into the waters of the Gulf of Mexico."

*17 That the act creating the State of Mississippi was the organization * of a state government in the western part of Mississippi Territory; that the southern part of the territory of Mississippi was added thereto by an act of Congress approved May 14, 1812, which provided: "That all that portion of territory lying east of Pearl river, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is hereby annexed to the Mississippi Territory; to be governed by the laws now in force therein, or which may hereafter be enacted, and the laws and ordinances of the United States, relative thereto, in like manner as if the same had originally formed a part of said Territory; and until otherwise provided by law, the inhabitants of the said district hereby annexed to the Mississippi Territory, shall be entitled to one representative in the General Assembly thereof." 2 Stat. 734.

That this act and the act admitting the State of Mississippi "recognized the fact that the boundary line of the State of Louisiana embraced no island in the waters to the east of said State and to the south of the Mississippi mainland, or shore, and within six leagues of the Mississippi shore; that the said Louisiana acts are not in conflict with the aforesaid Mississippi acts, the boundaries of Louisiana only embracing such islands, as clearly shown by said acts creating and admitting her, as were within the Gulf of Mexico and also within three leagues of her Gulf coast, that is to say, within the Gulf of Mexico proper and to the south of said State of Louisiana as contemplated by Congress; that the said line from the mouth of Pearl river to the Gulf of Mexico dividing the Territory of Mississippi from the State of Louisiana was never defined until the passage of the act creating the State of Mississippi, when, for the first time, the southern boundary of the Mississippi Territory, the western part of which was, by said act,

made the State of Mississippi, was accurately defined and established as herein stated; that the line above described and defined by the said Mississippi acts, includes no islands which are within three leagues of the Louisiana main-
*18 land and also in the Gulf of Mexico as the limits * of the Gulf of Mexico are defined by the said State in her original bill herein."

That the State of Louisiana "claims title and sovereignty over some of the islands belonging to the State of Mississippi by virtue of certain alleged action of certain officers of the United States Government and local officers of the State of Louisiana," but the claim "is not well founded because of the matters herein set forth and because said islands and territory have not been susceptible to actual use and occupation and because said claim is in violation of sec. 3, art IV, of the Constitution of the United States. . . ." But if the court should adjudge said islands and territory approved by the aforesaid officials to the State of Louisiana to belong to said State, then cross-complainant prayed that the claim of title of Louisiana thereto "be restricted to the real lands or islands so lost to the State of Mississippi, and be in no case permitted to affect any lands under the waters, or any of the public oyster reefs thereunder."

It was then alleged that Mississippi had "exercised sovereignty and jurisdiction over said waters within eighteen miles of her shore aforesaid," and that by her statutes as codified in 1857 had asserted such jurisdiction.

And that by the legislation of Congress and the State, the "'Mississippi Sound' was recognized as a body of water, six leagues wide, wholly within the State of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from 'the Gulf of Mexico.'"

The cross bill further averred that Congress "in the early history of the Republic, in dealing with the Gulf coast or shore," was not perfectly familiar with the line, and by several acts "creating the Gulf States, respectively, treated the said Gulf coast or shore as a line running generally from east to west," and said States were, in the contemplation of Congress, "so formed and bounded as to give to each State jurisdiction over the waters adjacent to its shore or coast for a certain specified distance southward from its mainland line; that it
*19 was * not intended to give to any State jurisdiction over waters adjacent to and immediately south and in front of any other State or Territory." But that the deep water channel line contended for by Louisiana would take nearly all of the Hancock County water front, much of that of Harrison County, and possibly some of that of Jackson County, over all which Mississippi had exercised jurisdiction since her admission.

Reference was then made to the organization of Hancock and Jackson Counties in December, 1812, and of Harrison County in 1841; and to certain sections of the Revised Code of Mississippi of 1880 and a codification of 1892, making a general reference to islands within six leagues of the Mississippi shore; and it was charged that during all this time the government of the Mississippi Territory and that of the State of Mississippi had exercised full and complete jurisdiction and sovereignty over the waters in the "Mississippi Sound" as a part of the three counties aforesaid.

The prayer was that it be decreed "that the boundary line dividing the States of Mississippi and Louisiana is the line which, beginning at a point six leagues due south of that point on the shore where the Alabama and Mississippi line

enters the Gulf of Mexico, runs westwardly with the meanderings of the shore six leagues always therefrom until said line reaches and touches the real mainland of Louisiana about two miles due west of the 'Indian mound' and 'Lake of the Mound,' and thence in an almost due northward direction along and on the high tide mark of the said Louisiana mainland to Mississippi Sound at or near Nine Mile Bayou, and thence further along said mainland at the high tide mark westwardly to that point due south of the middle of the most southern, or eastern junction of Pearl River with Lake Borgne, and thence from said point due north to the said Pearl river; that the said line be located and permanently bouyed at the joint expense of the two States; that the full title and sovereignty over all the islands and the land under the waters north and east of the said line so
*20 established be decreed and adjudged to be in the * State of Mississippi, and that the State of Louisiana and her citizens be perpetually enjoined from disputing such title and sovereignty of the State of Mississippi therein," and for costs and general relief.

The following "Exhibit Map" was attached:

The State of Louisiana filed replication, and also an answer to the cross bill, the allegations of which were in substance denied.

*21 * As to the act of May 14, 1812, the State said that it could not and did not change the boundaries of Louisiana, and, that, in fact, the southern portion of the Mississippi Territory as claimed was not then in possession of the United States, and did not extend south of the thirty-first degree of north latitude; that February 12, 1812, an act was passed "authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi Territory and west of the river Perdido," but that this was not published until 1818; nor were the resolution of January 15 and act of March 3, 1811, on the relations of the United States to Spain, published until after April 20, 1818. 3 Stat. 471, 472.

The cause being at issue, much evidence, documentary and otherwise, was taken, and the case was argued October 10, 11 and 12.

Mr. John Dymond, Jr., Mr. Francis C. Zacharie and *Mr. Walter Guion,* Attorney General of the State of Louisiana, with whom *Mr. Alexander Porter Morse* and *Mr. Albert Estopinal, Jr.* were on the brief, for complainant:

The authority for bringing the suit is found in the act of the legislature of Louisiana, No. 65 of 1884 and in No. 26 of 1904, besides the general authority vested in the Governor and state officers to defend and protect the interests and property of the State. There exists a controversy between the two States of great magnitude and involving great financial interests.

The ownership of all the land that had not been previously sold by the State and the ownership of all of the water area in the disputed territory, being the bottom of navigable waters of the State, was vested in and claimed by Louisiana in her sovereign capacity and no individuals had any private rights therein. This water area had a positive value of great magnitude. The State, under her oyster law was vested with the ownership of these oyster water bottoms,

*22 and authorized to * rent them for the purposes of oyster cultivation for which she received a direct rental through her oyster commission of one dollar per acre per annum and a further revenue of two cents per barrel from each barrel of oysters gathered, either from these leased bedding grounds, or from the natural oyster reefs, which were also her property in absolute ownership. The State can rent them for $200,000 per annum, and they are therefore worth in the neighborhood of $5,000,000.

The control and possession of a considerable part of these waters had become the subject of a violent controversy and had reached the point of an armed conflict and could only be settled by resorting to this court. The jurisdiction is clear under the previous rulings. *Rhode Island* v. *Massachusetts,* 12 Pet. 719; *The Wheeling Bridge Case,* 13 How. 589; *South Carolina* v. *Georgia,* 93 U. S. 381; *Louisiana* v. *Texas,* 176 U. S. 1; *New Jersey* v. *New York,* 5 Pet. 284; *Missouri* v. *Illinois,* 180 U. S. 208; *Kansas* v. *Colorado,* 185 U. S. 125.

The State of Louisiana by the words of the law owns the peninsula of St. Bernard in its entirety and the islands in dispute, together composing the disputed area. Act of April 6, 1812, and act of April 14, 1812. The act grants all islands within three leagues of the coast and Louisiana therefore owns the islands and waters lying north of the St. Bernard peninsula and within nine miles from its coast. Mississippi's claim to islands and territory eighteen miles from her shore is based on a later act approved December 10, 1817. Congress

could not take away territory previously ceded to Louisiana and grant it to Mississippi.

Further, it is a general rule, that where there are two conflicting titles, the elder shall be preferred. Boone's Legal Maxims, 7th Am. ed. p. 355, with authorities in note 5. And this principle has been frequently applied by this court in cases of boundaries between States where the grants to the colonies prior to the establishment of our Government have seemed to conflict. No court acts differently in deciding on boundary between States, than on lines between
*23 separate tracts of land, * and the rules and principles of equity apply between States, as between individuals. *Rhode Island* v. *Massachusetts,* 12 Pet. 658.

Louisiana's title to the disputed area is also established by the fact that the said area is south of and on the Louisiana side of the deep water channel boundary line and as this deep water channel sailing line is the correct water boundary between the States at this point all land and water south of it is the property of the State of Louisiana.

This deep water sailing channel line claimed by Louisiana as the proper boundary between the two States exists to-day and is shown on the United States Coast and Geodetic Survey of that section.

The deep water channel is a boundary created by nature and the soils separated by it and forming the limits of the two States are of natural geological difference. Nature made the deep water channel her boundary in this area and the subsequent enactments of man were but a confirmation of this basic principle. *Indiana* v. *Kentucky,* 136 U. S. 479. On the Mississippi side the islands and shores are of sea sand formation while those on the Louisiana side are alluvial.

The deep water sailing channel line is the boundary that was recognized by England, France and Spain in their ancient treaties affecting their separate interests in this country.

The adoption by the Congress of the United States, in the creation of the State of Louisiana, of the line extending down the Mississippi river to the river Iberville and thence through the middle of Lakes Maurepas and Pontchartrain to the sea as one of the boundaries of that State was not a new line established for the first time but was in fact an affirmation of an ancient line which in its extension to the open sea must follow the deep water channel. The treaty of peace between England, France and Spain adopted February 10, 1716, article VII, treats of the subject of the boundary line separating the dominions of England and France in the New World, and follows the middle of the
*24 Iberville. See also treaty of February 10, 1763; * between the same nations using practically the same language; treaty of September 3, 1783, between England and Spain; treaty of St. Ildefonso, October 1, 1800, between France and Spain, and finally the cession of Louisiana to the United States by France, April 30, 1803.

The deep water channel was in fact recognized by the Congress of the United States in its legislation and in the treaties referring to this section of the country, as the proper boundary, and according to which it divided it up. Act of March 28, 1804; act of February 20, 1811, using the same language employed in the treaties, "the middle of the river" Iberville.

The first extension of the territory of Mississippi south of 31° of north latitude was by act of May 14, 1812, over one month after the creation of the State of Louisiana and at that time the territory affected was not in the possession of the United States. See act of February 13, 1813. But the State of

Mississippi was not created until 1817 when for the first time is mentioned the islands within six leagues of the shore.

The deep water sailing channel is the proper boundary line between the two States recognized by all rules of international law. "Coast" is the seaboard of a country and includes bordering islands. 6 Am. & Eng. Ency. of Law, 171; *The Anna*, C. Rob. 373.

Mr. Justice Story in *Thomas* v. *Hatch*, 3 Sumn. 178, defined "shore" to be the space between the margin of the water at a low stage, and the banks to be what it contains in its greatest flow; Lord Hale defined it as synonymous with flat; Mr. Justice Parker does the same in 6 Massachusetts, 436, 439, and Chief Justice Marshall described the shore of a river as bordering on the water's edge. *Alabama* v. *Georgia*, 23 How. 513.

"Thalweg" a term now universally used by international law-writers to define water boundaries between States and Nations, is a German word composed of two separate words, "thal," a valley, and "weg," way, meaning the middle or the deepest or most navigable channel. An English equivalent may be "fair-way" or "midway" or "main channel."

*25 * Where a navigable river forms the boundary of coterminous States, the middle of the channel—the *filum aquae* or *thalweg*—is generally taken as the line of their separation. I Halleck's Int. Law, Baker's ed. p. 145, citing Gundling, Jus. Nat. p. 248; Wolfius, Jus Gentium, §§ 106–109; Stypmannus, Jus. Marit., etc., cap. V, n. 476–552; Merlin, Repertoire, voc. "alluvium"; Rayneval, Droit de la Nature, tome I, p. 307; De Cussy, Droit Maritime, liv. I, tit. II, § 57; Rayneval, Inst. du Driot Nat., liv. II, ch. XI; Pothier, Œuvres de, tome X, pp. 87, 88; Voet, ad Pandects, tome I, pp. 606, 607; Heineccius, Recitaciones, lib. II, tit. I, §§ 356–369; Las Siete Partidas, pt. III, tit. XXVIII, L. 31; Gomez, Elementos, lib. II, tit. IV, § 3; Febrero Mexicana, tome I, p. 161; Sala Mexicana, tome II, p. 62; Justinian, Inst., lib. II, tit. I, Nos. 20–24; De Camp's Manuel des Prop. Riv., *passim;* Chardon, Droit a' Alluvion, *passim;* Grotius, De Jur. Bel. ac. Pac., lib. VII, ch. III, § 17; Ortolan Domaine International, Nos. 85–93; Heffter, Droit International, No. 69, note; Gunther, Europ. Volkerrecht, tit. II, p. 57; Pestel, Commentarii de Repub. Batav. No. 268; Bowyer, Universal Public Law, ch. XXVIII; Riquelme, Derecho Pub. Int., lib. I, tit. I, ch. IV; Bello, Derecho Internacional, pt. I, cap. III; Pando, Derecho Internacional, p. 99; Almeda, Derecho Publico, tome I, p. 199; Cushing, Opinions U. S. Att'ys Gen'l, vol. VIII, p. 175; Crittenden, Opinions U. S. Att'ys Gen'l, vol. V, pp. 264, 412; Puffendorf, De Jur. Nat. et Gent., lib. IV, ch. V, § 8; Wolfius, Jus Gentium, §§ 108, 109; Proudhon et Dumay, Domaine Public, tome IV, ch. LVI, sec. 7. See also Baker's Int. Law, p. 68; Bowen's Int. Law, p. 10; Creasy, Int. Law, p. 221, citing Halleck, p. 138, Twiss, p. 201; Grotius, Lib. II, ch. III, sec. 18; Klubn, sec. 133; Twiss, Law of Nations, citing Grotius, lib. II, ch. III, § 8; Puffendorf, lib. IV, ch. V, § 8; Hall, Int. Law, citing Grotius, lib. II, ch. III, § 18, Wolfius, Jus Gentium, §§ 106, 107, Vattel, liv. LIV, ch. XXII, § 266, De Martens, Precis, No. 39, the Twee Gebroeders, 3 Rob. 339, 340; Bluntschli, §§ 297, 298, 301; Twiss, I, §§ 143, 144; Droit des Gens. Rivier, sec. 14; Droit des

*26 Gens, * De Martens, vol. 1, No. 39; Droit International, Fodéré, § 657; *Devoe Mfg. Co.*, 108 U. S. 401; Moore, Int. Arb., vol. 1, p. 229, where the decision of the San Juan water boundary dispute is found; the boundaries of the various bordering States on the Danube, State Papers, 1878, 1879, vol. 70, p. 514 *et seq.;* the Detroit River boundary, Ganett's Boundaries 3d ed. p. 12; the Alaskan Boundary case, Foreign Relations, 1903, p. 544.

Louisiana's title to the disputed territory is confirmed by prescription usucaption, acquiescence, and specific acknowledgment by the State of Mississippi.

The surveys of this territory were made by the United States Government about the year 1842 and all lands to the channel were credited to Louisiana.

Under the Swamp Land Acts of 1849 and 1850 all lands selected by Louisiana south of the channel were approved by the Government and portions of them were subsequently sold by Louisiana to individuals at different times down to 1894.

The disputed territory has always been subject to the sovereignty of Louisiana and has yielded taxes to her exclusively according to the assessments laid by her officers.

All of the Departments of the Government in interpreting the acts of Congress have accredited the disputed territory to Louisiana.

The State of Mississippi has recognized the disputed territory as being the property of the State of Louisiana, and her present boundary pretension is but a matter of recent creation after long years of recognition of, and acquiescence in, Louisiana's ownership and sovereignty.

It was only after the oyster fishermen of Mississippi by their wasteful system of fishing had either fished up or destroyed all of the Mississippi oysters of any value that these fisherman began to invade Louisiana waters in search of them. Until recent years the Louisiana fisheries were open to all, but are now closed to all except her citizens. It was the exercise of this right that incurred Mississippi's displeasure and brought about this suit. That State made no
*27 claim to the territory under the * Swamp Acts and it was granted to Louisiana by the Government.

In 1839 a survey of the Mississippi coast was made pursuant to an act of its legislature. This survey and the report accompanying the same show the deep water channel and credit the territory south of it to Louisiana. The official maps made and supplied by the State to county officers pursuant to the acts of 1866 and 1871 are to the same effect. See also map published by the board of immigration and agriculture of Mississippi under act of 1882.

The doctrine of ownership by prescription is fully sustained by the writers on international law and by the decisions. Pradier Fodéré, tome II, p. 337, citing and reviewing all the authorities; the Delagoa Bay dispute, State Papers, vol. 66, 1874, 1875, p. 554; the Great Britain-Venezuela dispute, Moore's Int. Arb. vol. 5, p. 5017; *Keyser* v. *Coe,* 9 Blatch. 32; *Rhode Island* v. *Massachusetts,* 4 How. 638; *Missouri* v. *Kentucky,* 11 Wall. 403; *Kentucky* v. *Indiana,* 136 U. S. 511; *Virginia* v. *Tennessee,* 148 U. S. 522.

Mr. Hannis Taylor, Mr. J. N. Flowers and *Mr. Monroe McClurg,* with whom *Mr. William Williams,* Attorney General of the State of Mississippi, was on the brief, for defendant:

The action of Congress from 1812 to 1819 in carving out of the Louisiana Purchase and the Mississippi Territory the States of Louisiana, Mississippi and Alabama, giving each a portion of the sea front shows the execution of a common design. The different acts so far as they may be in apparent conflict, must be construed together. 26 Am. & Ency. of Law, 2d ed. 620; *Alexander* v. *Alexandria,* 5 Cranch, 8; *Patterson* v. *Winn,* 14 Pet. 366; *United States* v. *Freeman,* 3 How. 563; *Converse* v. *United States,* 21 How. 463; *United States* v. *Walker,* 22 How. 299; *Ryan* v. *Carter,* 93 U. S. 78; *Vane* v. *Newcombe,* 132 U. S. 220.

In connection with the foregoing the court must apply the equally im-
*28 portant rule that, where a particular construction of * a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the

statute. *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 37; *Wilson* v. *Rousseau,* 4 How. 646, 680; *Bloomer* v. *McQuewan,* 14 How. 539, 553; *Blake* v. *National Banks,* 23 Wall. 307, 320; *United States* v. *Kirby,* 7 Wall. 482, 486; *Knowlton* v. *Moore,* 178 U. S. 77. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter. *United States* v. *Kirby,* 7 Wall. 482.

In order to understand the controlling reason underlying the three acts in question considered as one connected whole, there must be taken into consideration the physical conformation and relative extent of the sea front, which they attempted to apportion, as equally as possible, among the States of Louisiana, Mississippi and Alabama. It is well settled that courts will take judicial notice of the prominent geographical facts and features of the country. *The Apollon,* 9 Wheat. 362; *The Montello,* 11 Wall. 411. A court will also take judicial notice of the positions of islands off the coast of a State. *State* v. *Wagner,* 61 Maine, 178. The court has therefore complete judicial knowledge of the geography of the sea front in question, and of the positions of the islands adjacent thereto, to whose partition the three related acts must be applied. To the States of Mississippi and Alabama were given, in identical language, all islands "within six leagues of the shore," and to Louisiana "all islands within three leagues of the coast," the conclusion is irresistible that the wider zone of islands given to the States first named was intended to compensate for the fact that the latter has more than four times as long a sea front as both combined.

*29 Everything indicates the intention of Congress to give to each of the three States in question the islands directly * in front of it; and to the first two a zone of islands twice as wide as that given to the latter for the reason stated. The rule of construction which provides that statutes shall be so construed that they shall not "produce inequality and injustice" is based upon the assumption that legislatures always intend by their acts to establish equality and justice. In this case full justice and equality could not be accorded either to Mississippi or Alabama, even by the grant of the wider zones of islands, because of the far more extended sea front of Louisiana.

There is a well defined international rule which provides that where there is more than one channel in a river dividing coterminous States, the deepest channel is the mid-channel or thalweg for the purposes of territorial demarcation. Grotius, De Jure Belli ac Pacis, II, c. 3, sec. 17; Vattel, Droit des Gens, Bk. I, c. XXII, sec. 26. This general rule has no application to a case governed by a special rule established by convention, or by a special right based on prior possession. Twiss, Int. Law, p. 127; 1 Halleck, Int. Law (Baker's ed.), p. 171. It appears from these authorities that the rule in question is confined to the mid-channel or thalweg of rivers, or to a mid-channel which forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. The moment the sea is reached, or a body of water which is a part of the sea, the rule is at an end.

The attempt to extend the rule beyond the estuaries of the river into the open sea, that is, into the open waters of the Gulf of Mexico, cannot be supported either by reason or authority. Not by reason, because the wide expense of water, unconfined between banks, utterly fails to serve as a boundary, not by authority, because there is no precedent for such an extension of the rule in any work on international law.

Whenever it is necessary for two contiguous States to run a water boundary through an archipelago of islands off their coasts it is only possible to do so by convention, as international law provides no rule upon the subject. For
*30 that reason * Great Britain and the United States, in the famous treaty of 1846, stipulated that the line between them should be continued westward along the forty-ninth parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of said channel and of Fuca's Straits to the Pacific Ocean." The Emperor of Germany was called upon, as arbitrator, to decide "whether the boundary line which, according to the Treaty of Washington of June 15, 1846, after being carried westward along the forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island is thence to be drawn southerly through the middle of the said named channel and of the Fuca Straits to the Pacific Ocean, should be drawn through the Rosario channel as the Government of Her Britannic Majesty's claims, or through the Haro Channel as the Government of the United States claims." There was no pretense of the existence of any such general rule of international law or "custom" as complainant claims in this case. Only the conventional rule laid down in the treaty was contended for by either side, and its construction was the only subject of the award.

By the express terms of the acts, Congress established a definite land boundary for the State of Louisiana. A special rule having been thus established by competent authority, a general rule, even if such a one existed could not be invoked. General rules of international law are never applied under such circumstances. See Grotius, De Jure Belli ac Pacis, II, c. 3; Bluntschli, XV, 2; Martens, Precis, sec. 119, p. 320; Colvo, Droit Int. I, sec. 19, p. 109, Phillimore, Int. Law. I, pp. 44, 45 (2d ed. London); 1 Twiss, Law of Nations, pp. 130, 131; Lawrence's Wheat., p. 28; 1 Halleck, Int. Law, (Baker's ed.), p. 50; Lorimer, Ins. of Int. Law, I, p. 43.

Physical geography simply reproduces the actual coast lines of maritime States, as they are defined by nature at the point of contact of the sea with the land, while the political coast line, superimposed upon it by operation of
*31 international law, * is vastly shorter by reason of the fact that the artificial and imaginary line cuts across the heads of bays and inlets. The natural coast line, as known to physical geography, exists primarily for the purpose of boundary. The artificial coast line, as known to international law, exists only for the purposes of jurisdiction. Rivier, Principes du Droit des Gens, vol. I, pp. 145, 146, 170.

Both in their popular and technical senses "coast" and "shore" are identical and convertible terms. 4 Am. & Eng. Ency. of Law, 2d ed. p. 818. See *United States* v. *Pacheco,* 2 Wall. 587; Farnham on Waters, vol 2, p. 1463 and vol. 1, p. 227. The word "shore" is also used in admitting Alabama.

An island is a body of land surrounded by water. 17 Am. & Eng. Ency. of Law, 2d ed. p. 530. A body of land continuously covered by water is not an island. *Weber* v. *Pere Marquette Boom Co.,* 62 Michigan, 626. It does not lose its character by being almost submerged at high tide. *De Guyer* v. *Banning,* 167 U. S. 723. As to erosion and submergence, see *Widdicombe* v. *Rosemiller,* 118 Fed. Rep. 295. It is necessary that a strip of navigable water should separate it from the mainland. *Dumphry* v. *Williams,* 2 Pugsley (N. B.), 350; *King* v. *Young,* 76 Maine, 76; *American River Water Co.* v. *Amsden,* 6 California, 443; *Attorney General* v. *Woods,* 108 Massachusetts, 436; *Grand Rapids* v. *Powers,* 89 Michigan, 94; *Bamphrey* v. *State,* 52 Minnesota, 181.

The business of a cartographer, or map-maker, is to describe land forms,

not to settle titles of particular sovereignties to particular parts of the earth's surface. The value of every map depends upon two factors; first, the completeness of the data out of which it is constructed; second, the skill of the cartographer in working such data into an harmonious whole. Early maps, which are necessarily based upon incomplete data, are almost invariably misleading guides. For that reason, international jurists generally regard such maps as of little or no value in boundary controversies. The great English jurist, Sir Travers Twiss, in speaking of the uselessness of maps in the
*32 * investigation of boundary questions, has even regretted that they are ever appealed to at all. See Greenhow's History of Oregon and California, p. 437, note; *United States* v. *Texas,* 162 U. S. 1.

There is nothing in the Swamp Land Act to give color to the idea suggested in the bill, that Congress, as well as the various departments of the United States Government, having authority in the premises, have themselves recognized the boundary line contended for by Louisiana by reason of the fact that the United States Government has confirmed to the State of Louisiana the lands composing Half Moon Island, etc. So far from there being the slightest foundation of truth for that suggestion the fact is that the act in question undertook to give to complainant as a donation certain lands which, by her application for them, she admitted belonged, not to her, but to the United States.

If defendant's contention is sound that the islands in question were conveyed to her by an express grant upon her admission to the Union in 1817, then the subsequent act of March 2, 1849, purporting to donate certain swamp and overflowed lands to complainant can have no possible operation for the simple reason that the United States had, at the date of said act, neither title nor interest. Grants made by a legislature are not warranties; and if the thing granted was not in the grantor at the time of the grant, no estate passes to her grantee. *Rice* v. *Minn & N. W. R. R. Co.,* 1 Black, 358; *Polk* v. *Wendal,* 9 Cranch, 87. If that be true, then the *ex parte* proceeding of the Secretary of the Interior in 1852 was simply null and void as an attempt to take away a part of the domain of a State without the consent of its legislature. Art. IV, § 3, Const. U. S.

The doctrine of acquiescence does not apply to wild and unsettled lands such as were those in dispute. The assertion of sovereignty by Louisiana practically dates from the act of its legislature of 1902 relating to the dredging of oysters. Mississippi has never acquiesced in the claims of Louisiana but
*33 on * the contrary has exercised sovereignty over the disputed territory in many ways, *e. g.,* its courts in 1821 convicted for robbery; an inquest was held upon a body found in the waters of Isle à Pitre in 1886; in 1893 an arrest was made for violations of oyster laws in these waters. The legislature in 1857 passed an oyster and game law covering the territory in question, which was embodied in the Revised Statutes of the State for 1871, 1880 and 1892.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

The demurrer was overruled because the court was of opinion that the bill presented a *prima facie* case of justiciable controversy between the State of Louisiana and the State of Mississippi as to the boundary line between them, and we are clear that proofs establish the existence of such a controversy as to fully sustain our jurisdiction.

It is apparent that the enforcement of the oyster legislation of the two States led to a conflict between the authorities of both, which involved a dispute as to the true boundary line.

In 1886 the State of Louisiana passed an act vesting the power to control the oyster industry in the hands of the officials of the parishes of the State in their several localities, along general lines laid down in the law. Laws Louisiana, 1886, Act No. 106. This was followed by the acts of 1892 (No. 110), 1896 (No. 121), and 1900 (No. 159). By the act of 1896 non-resident oyster fishermen were prohibited from fishing oysters in Louisiana waters, and the dredging of oysters was also prohibited, in this particular differing from the laws of Mississippi, which permitted it. By a concurrent resolution of 1900 a Legislative Commission was created to investigate and report on the oyster industry of the State.

In January, 1898, the parochial authorities of the parish of St. Bernard equipped and sent out an official expedition to exclude from the oyster
*34 waters of the parish any non-resident * oyster fishermen who might be found fishing therein. Nonresident Mississippi oystermen were found fishing oysters there, and they were notified that they must stop fishing and move out of those waters. These Mississippians then complained to the Mississippi authorities and a conference ensued between representatives of the parish of St. Bernard and the county of Hancock. In January, 1901, at the instance of the Louisiana Legislative Commission appointed under the act of 1900, and of committees appointed from the police juries of the Louisiana parishes of St. Bernard and Plaquemines, a meeting of the state officials of Louisiana was held in New Orleans to consider the subject of the dispute with the State of Mississippi, and the invasion by non-residents of the Louisiana oyster waters. This meeting resulted in the appointment by the Governor of Louisiana of a commission of five members, and an official communication from the Governor of Louisiana addressed to the Governor of Mississippi requesting the latter to appoint a similar commission to see if it were possible to effect an amicable settlement of the dispute between the two States. This Mississippi commission was accordingly appointed, and the two commissions held a joint conference in New Orleans in March, 1901. Louisiana presented at the conference a map showing the Louisiana contention as to the boundary, which is the map attached to the bill and marked Exhibit E. The Mississippi commission reported that it was impossible to effect an amicable extra-judicial settlement of the dispute, and that the only hope of settlement was a friendly suit in the Supreme Court of the United States. This report was submitted by the Mississippi commission to the Governor of Mississippi and was transmitted to the legislature of that State. At this session the State of Mississippi passed a new law controlling her oyster waters and oyster industry. Laws, 1902, c. 58. This act created a state oyster commission, vested with entire control of the Mississippi oyster industry. It took the control of the industry out of the hands of the coast county authorities and centralized
*35 it in this state department, which was authorized to establish a * system of patrol of the Mississippi oyster waters and to maintain patrol boats to sustain the oyster laws in her territory. In July, 1902, the State of Louisiana followed the example of the State of Mississippi and adopted an act, Acts 1902, No. 153, creating a state oyster commission of Louisiana as a state department vested

with full control of the oyster industry of Louisiana, and authorized to establish patrol boats and maintain an armed patrol on the Louisiana oyster waters to protect her rights in the oyster industry therein. In view of the danger of an armed conflict, the Oyster Commissions of both States, in September, 1902, adopted a joint resolution establishing a neutral territory between the two States "pending the final decision by the Supreme Court of the United States in the boundary suit to be instituted," to remain a common fishing ground. This *modus vivendi* did not include all of the disputed territory, but the waters of Mississippi Sound between the deep water channel and the north shore line of the Louisiana marshes were embraced by it.

In the following October this bill was filed. Louisiana appeared through her Governor and her Attorney General, and the action of the Governor in instituting the suit was subsequently approved, ratified and confirmed by the legislature.

The facts that the act of Congress admitting the State of Louisiana gave that State all islands within three leagues or nine miles of her coast, and that the subsequent act of Congress admitting the State of Mississippi purported to give that State all islands within six leagues or eighteen miles of her shore, and that some islands within nine miles of the Louisiana coast were also within eighteen miles of the Mississippi shore, furnished the basis for a boundary controversy, although, in our judgment, the apparent inconsistency is reconcilable, as hereinafter explained. And that controversy involved to each State pecuniary values of magnitude, as is shown by the evidence on both sides. We think that there existed between the two States, in their sovereign capacity as States, a controversy affecting the boundary line separating them in the
*36 locality in * question of a character to justify the exercise of our original jurisdiction within the rules laid down in *Missouri* v. *Illinois,* 200 U. S. 496; *S. C.* 180 U. S. 208; *Pennsylvania* v. *Wheeling Bridge Company,* 13 How. 518, 589; *Louisiana* v. *Texas,* 176 U. S. 1; *Kansas v. Colorado,* 185 U. S. 125.

2. The State of Louisiana was admitted into the Union by the act of Congress approved April 6, 1812, 2 Stat. 701, c. 50, which commenced as follows:

"*Whereas,* the representatives of the people of all that part of the territory or country ceded under the name of 'Louisiana' by the treaty at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: Beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along said parallel of latitude to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence, bounded by the said Gulf, to the place of beginning, including all islands within three leagues of the coast: . . ."

Map of diagram No. 1 (*ante,* p. 4), given in the opening statement, shows the limits as thus defined.

By an act of Congress approved April 14, 1812, 2 Stat. 708, c. 57, additional territory was added to the State of Louisiana, described thus:

"All that tract of country comprehended within the following bounds, to

wit: Beginning at the junction of the Iberville, with the river Mississippi; thence along the middle of the Iberville, the river Amite, and the Lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl river; thence up the eastern branch of Pearl river to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said
*37 river to the place of beginning, * shall become and form a part of the said State of Louisiana, and be subject to the constitution and laws thereof, in the same manner, and for all intents and purposes, as if it had been included within the original boundaries of the said State."

This added territory is shown on map or diagram No. 2.[1] The eastern boundary of Louisiana was thereby moved eastward from the Mississippi to Pearl river, and Louisiana was given the country south of the thirty-first degree of north latitude, and north of the boundary formed by the river Iberville, the middle of Lakes Maurepas and Pontchartrain and the Rigolets.

The river Iberville is called on this map Bayou Manchac, and is still known by that name. The Rigolets is a gut connecting the waters of Lakes Pontchartrain and Borgne, both of which are bodies of salt water and were originally arms of the sea. In order to reach the open waters of the Gulf of Mexico from the middle of Lakes Maurepas and Pontchartrain the line ran through the Rigolets into Lake Borgne, and after the addition to the State by the act of April 14, 1812, the eastern boundary line of Louisiana entered Lake Borgne to the south by Pearl river as well as the Rigolets. To get from Lake Borgne into the open water of the Gulf of Mexico beyond Chandeleur Islands and around to the western boundary of Louisiana, it was necessary, as Louisiana contends, to follow the deep water channel north of Half Moon or Grand Island, through Mississippi Sound, and thence by the pass between Cat Island and Isle à Pitre, north of the Chandeleur Islands, into the open Gulf. Many maps are given in the record, some made at dates long prior to the admission of Louisiana as a State, some at that time, and some within a few years thereafter, and all show the St. Bernard peninsula to be geographically a true part of the State of Louisiana, or of an area of country that was to form the State, and that the said peninsula projected itself as a well-defined arm of land out into the waters of the Gulf, branching off as a projection from the main body of land
*38 composing * the State, and forming a part of it. We observe that on many of these early maps the term "peninsula" is applied to this projection, and that designation is sufficiently accurate for the purpose of description.

November 14, 1803, President Jefferson sent a communication to Congress, in which, among other things, he said:

"The object of the following pages is to consolidate the information respecting the present State of Louisiana, furnished to the Executive by several individuals among the best informed on the subject.

"Of the province of Louisiana no general map, sufficiently correct to be depended upon, has been published, nor has any been yet procured from a private source. It is, indeed, probable that surveys have never been made upon so extensive a scale as to afford the means of laying down the various regions of a country which in some of its parts appears to have been but imperfectly explored. . . .

[1] *Ante*, p. 1484.

"St. Bernardo.

"On the east side of the Mississippi, about five leagues below New Orleans, and at the head of the English Bend, is a settlement known by the name of the Poblacion de St. Bernardo, or the Terre au Bœufs, extending on both sides of a creek or drain, whose head is contiguous to the Mississippi, and which flowing eastward, after a course of eighteen leagues, and dividing itself into two branches, falls into the sea and Lake Borgne. This settlement consists of two parishes, almost all the inhabitants of which are Spaniards from the Canaries, who content themselves with raising fowls, corn and garden stuff for the market at New Orleans. The lands cannot be cultivated to any great distance from the banks of the creek, on account of the vicinity of the marsh behind them, but the place is susceptible of great improvement, and of affording another communication to small craft of from eight to ten feet draught, between the sea and the Mississippi."

"Country from Plaquemines to the sea, and effect of the hurricanes:

*39 * "From Plaquemines to the sea is twelve or thirteen leagues. The country is low, swampy, chiefly covered with reeds, and having little or no timber, and no settlement whatever. It may be necessary to mention here, that the whole lower part of the country, from the English Turn downwards, is subject to overflowing in hurricanes, either by the recoiling of the river, or reflux from the sea on each side; and, on more than one occasion, it has been covered from the depth of two to ten feet, according to the descent of the river, whereby many lives were lost, horses and cattle swept away, and a scene of destruction laid. The last calamity of this kind happened in 1794, but fortunately they are not frequent. In the preceding year the engineer who superintended the erection of the fort at Plaquemines was drowned in his house near the fort, and the workmen and garrison escaped only by taking refuge on an elevated spot in the fort, on which there were notwithstanding two or three feet of water. These hurricanes have generally been felt in the month of August. Their greatest fury lasts about twelve hours. They commence in the southeast, veer about to all the points of the compass, are felt most severely below, and seldom extend more than a few leagues above New Orleans. In their whole course they are marked with ruin and desolation. Until that of 1793, there had been none felt from the year 1780."

This communication was, of course, before Congress when the act of 1812, admitting Louisiana, was approved, and the peninsula was clearly recognized as forming part of the parish of St. Bernard, as was its marshy character and that of the adjoining parish.

By the act of Congress, approved March 1, 1817, 3 Stat. 348, c. 23, the inhabitants of the western part of the then Mississippi Territory were authorized to form for themselves a state constitution and to be admitted into the Union with the following boundaries: "Beginning on the river Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee river; thence up

*40 the same to the mouth of Bear * creek; thence by a direct line to the northwest corner of the county of Washington; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne; thence up

said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi river; thence up the same to the beginning."

The people in convention, August 15, 1817, formed a constitution and state government (approved subsequently by popular vote), and the State was admitted by resolution December 10, 1817, 3 Stat. 472.

The State of Alabama was admitted by the act of March 2, 1819, 3 Stat. 489, c. 47, which provided: "That the said State shall consist of all the territory included within the following boundaries, to wit: Beginning at the point where the thirty-first degree of north latitude intersects the Perdido river; thence, east, to the western boundary line of the State of Georgia; thence along said line, to the southern boundary line of the State of Tennessee; thence, west, along said boundary line, to the Tennessee river; thence, up the same, to the mouth of Bear creek; thence, by a direct line, to the northwest corner of Washington county; thence, due south, to the Gulf of Mexico; thence, eastwardly, including all the islands within six leagues of the shore, to the Perdido river; and thence, up the same to the beginning."

The islands, marsh or otherwise, claimed by Louisiana in this case were all within three leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana act, yet Mississippi claims thereunder the disputed territory, as being islands within eighteen miles of her shore. If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that State and give it to the State of Mississippi. The rule, *Qui prior est tempore, potior in jure,* applied, and section three of article IV of the Con-
*41 stitution does not permit the claims of any particular State to be * prejudiced by the exercise of the power of Congress therein conferred.

But it is said that the act admitting Louisiana, the act admitting Mississippi, and the act admitting Alabama must be construed as *in pari materia;* and, being so construed, that Congress must be held to have had in view in the three acts a division of the coast along the Gulf of Mexico so as to equalize the water frontage of Mississippi, Louisiana, and Alabama.

We do not regard these acts as *in pari materia* in any proper sense. They provided for the admission of three separate States, and the subject of each was not only not identical with, but not even similar to, that of the others. They did not form part of a homogeneous whole, of a common system, so as to allow a claimant under the later act to successfully contend that it changed the earlier act by construction or effected such change because declaratory of the meaning of the prior act.

And assuming for the sake of argument that the Louisiana and Mississippi acts were irreconcilably inconsistent, but remembering that when Louisiana was admitted into the Union, the territory now composing the coast counties of Mississippi, that is, below the thirty-first degree of north latitude, was not actually a part of the Mississippi Territory but was in dispute between the United States and Spain, the theory of any preconcerted design in regard to the water front of the two States is too unreasonable to be entertained.

In the treaty of peace between England, France and Spain of February 10, 1716, Article VII, on the subject of the boundary line separating the dominions of England and France in the New World, provided: "That for the future the confines between the dominions of His Brittanic Majesty and those of His

Most Christian Majesty in that part of the world shall be fixed irrevocably by a line drawn along the river Mississippi from its source to the river Iberville, and from thence by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain to the sea." According to this treaty Eng-
*42 land retained the port of Mobile and its river and everything east * of the Rigolets. The Island of Orleans, formed by the river Iberville, Lakes Maurepas and Pontchartrain, the Rigolets, the Gulf of Mexico and the Mississippi river, remained the property of France. In the treaty of February 10, 1763, practically the same language is used in describing the boundary line separating the British from the French territory, and by the twentieth article the cession to England of Florida by Spain and all that Spain possessed on the continent of North America was provided for. By the treaty of September 3, 1783, between England and Spain, England retroceded East and West Florida to Spain. By the treaty of St. Ildefonso of October 1, 1800, Spain ceded to France "the colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other States." April 30, 1803, France ceded to the United States "the colony or province of Louisiana," using the same description as used by Spain in ceding the territory to her, and stating in Article II "In the cession made in the preceding article are included the adjacent islands belonging to Louisiana. . . . "

There is nothing in any of these transfers to raise a doubt that the peninsula of St. Bernard was part of the Island of Orleans and that this Island of Orleans was in fact formed by the extension to the sea of the boundary line coming down through the middle of Lakes Maurepas and Pontchartrain and so finding its way to the sea by the deep water channel.

March 26, 1804, an act of Congress was approved, dividing the country acquired as Louisiana from France into two parts, providing:

"That all that portion of the country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi Territory and on an east and west line to commence on the Mississippi river, at the thirty-third degree of north latitude, and to extend west to the western boundary of
*43 the said cession, shall constitute a Territory of the United * States under the name of the Territory of Orleans; the government whereof shall be organized and administered as follows:

* * * * * * * * * * *

"SECTION 12. The residue of the Province of Louisiana, ceded to the United States, shall be called the District of Louisiana, the government whereof shall be organized and administered as follows: . . . "

Congress manifestly regarded the lands to the east, that were south of the Mississippi Territory, and which form the disputed area of to-day, as part of the original Island of Orleans, included in the treaty of April 30, 1803; and these were given to the Territory of Orleans, whose southeastern boundary was the original southeastern boundary of the Island of Orleans. At that date the Mississippi Territory did not extend south of the thirty-first degree of north latitude and its domain did not reach the shore of Mississippi Sound, so called.

February 20, 1811, 2 Stat. 641, c. 21, an act of Congress was approved, "to enable the people of the Territory of Orleans to form a constitution and state

government, and for the admission of such State into the Union, on an equal footing with the original States, and for other purposes." The description of the limits was as follows: "Beginning at the mouth of the river Sabine, thence, by a line to be drawn along the middle of the said river, including all islands to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence bounded by said Gulf, to the place of beginning: including all islands within three leagues of the coast," etc.

The eastern boundary thus described is a water boundary, and, in extending this water boundary to the open sea or Gulf of Mexico, we think it included the Rigolets and the deep water sailing channel line to get around to the west-
*44 ward. A little * over one year later Louisiana was created a State by the act of Congress of April 6, 1812, with this identical eastern boundary line; and the addition of territory by the act of April 14, 1812, did not affect the deep water sailing channel line as a boundary.

April 7, 1798, 1 Stat. 549, c. 28, an act was approved "for an amicable settlement of limits with the State of Georgia, and authorizing the establishment of a government in the Mississippi Territory," which read in part: "That all that tract of country bounded on the west by the Mississippi; on the north by a line to be drawn due east from the mouth of the Yasous to the Chatahouchee river; on the east by the river Chatahouchee; and on the south by the thirty-first degree of north latitude, shall be, and hereby is constituted one district, to be called the Mississippi Territory." This was in conformity with the treaty between Spain and the United States of October 27, 1795. Maps of that date, and subsequently, show that the admitted rights of the United States did not at the time extend south of the thirty-first degree of north latitude at that point.

By an act of January 15, 1811, the President of the United States was authorized, among other things, in the event that any foreign government attempted to occupy the same, to take possession of the country lying east of the river Perdido, and south of the State of Georgia and the Mississippi Territory. The river Perdido is in the State of Alabama, east of the State of Mississippi, and flows into the Gulf of Mexico between Mobile Bay in Alabama and Pensacola Bay in Florida. A few days later, and on March 3, 1811, an act of Congress was approved, providing that the act of January 15, 1811, and this act, should not be published until the end of the next session of Congress, unless with the consent of the President.

By resolution approved January 15, 1811, it was specifically declared that the United States could not without serious inquietude see any part of the territory adjoining the southern border of the United States pass into the hands of any foreign power, "and that a due regard to their own safety compels
*45 * them to provide, under certain contingencies, for the temporary occupation of the said territory." 3 Stat. 471.

May 14, 1812, an act of Congress was passed, 2 Stat. 734, c. 84, to enlarge the boundaries of the Mississippi Territory, which used the following language: "That all that portion of the territory lying east of Pearl river, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is

hereby annexed to the Mississippi Territory," etc. The country described was not at the time in the possession of the United States, and on February 12, 1812, Congress passed an act "authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi Territory and west of the river Perdido," which act referred to the tract as "not now in the possession of the United States." 3 Stat. 472. But it was not until the enabling act in respect of Mississippi, approved March 1, 1817, that the language was used: "Thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river and Lake Borgne," etc.

The claim of Mississippi is that the disputed area is composed of islands, and as those islands are within eighteen miles of her shore, that they were given to her by the act of March 1, and the resolution of December 10, 1817. It is true there are some islands in that area, such as Grassy, Half Moon, Petit Pass and Isle à Pitre, all of which are between the deep water channel on the north and the main coast line of St. Bernard peninsula on the south.

The contention of Louisiana is that these islands were previously given to her by the act of April 6, 1812, more than five years prior to the admission of Mississippi, and that her title thereto, even if the acts were in conflict, is superior to that of the State of Mississippi; and she also contends that the islands belong to her because they are south of the deep water sailing channel line, which she submits is the true boundary line between the two States. Mississippi
*46 denies that the peninsula * of St. Bernard and the Louisiana Marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly there are in the body of the Louisiana Marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, but they are not true islands. They are rather, as the Commissioner of the General Land Office wrote the Mississippi land commissioner in 1904, "in fact, hummocks of land surrounded by the marsh and swamp in said townships. . . . "

And when the Louisiana act used the words: "thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast," the coast referred to is the whole coast of the State, and the peninsula of St. Bernard formed an integral part of it. Lake Borgne and Mississippi Sound are bodies of salt water and as such parts of the sea or Gulf, and as the coast of Louisiana began along the north shore of the peninsula, it is not to be supposed that the islands referred to by Congress in the Louisiana act were solely those islands to the south of that State.

The contention of Mississippi is based upon an assumed inconsistency between the Louisiana and the Mississippi acts, but we think upon a true interpretation, in the light of the facts, that no such inconsistency can be imputed. The maps show that there is a chain, not of alluvial but of sea sand islands running from the west shore of Mobile Bay in the State of Alabama, westward to and inclusive of Cat Island in the State of Mississippi. This chain forms the southern boundary of Misissippi Sound, and the islands are all relatively the same distance from the shore of the States of Mississippi and of Alabama. They, beginning at the eastern end, are Dauphin, Petit Bois, Horn, Ship and Cat Islands, and there are some other islands lying within this chain. If Congress referred to these

islands as being thus within six leagues of the shore, when the act creating the State of Mississippi was passed, it follows that there would be no conflict
*47 with prior existing boundaries of * the State of Louisiana, particularly if the deep water sailing channel line be taken as the correct boundary between the States. And when Congress created a separate territorial government for the eastern part of Mississippi Territory and called it Alabama, by the act of March 3, 1817, it used the same language concerning the western and southern boundary of the Territory: "thence due south to the Gulf of Mexico, thence eastwardly, including all islands within six leagues of the shore to the river Perdido and thence up same to the beginning." It seems obvious to us that it was to this chain of islands that Congress referred when it admitted Mississippi into the Union, and that it had no intention whatsoever of giving Mississippi any claim of ownership in the sea marsh islands, which had been previously granted to the State of Louisiana.

We are of opinion that the peninsula of St. Bernard in its entirety belongs to Louisiana; that the Louisiana Marshes at the eastern extremity thereof form part of the coast line of the State; and that the islands within nine miles of that coast are hers, except as restricted by the deep water sailing channel regarded as a boundary. Cat Island, for instance, is within the nine miles, but it is north of the deep water channel, is not alluvial, and is conceded by both States to belong to Mississippi.

3. That there is a deep water sailing channel line emerging from the mouth of Pearl river, and extending east between Lower Point Clear and Grand Island, is shown by the numerous maps, surveys and sketches in the record. It separates into two branches, one of them passing between Cat Island and Isle à Pitre.

Among the maps put in evidence by Louisiana is one prepared by George Gauld, M. A., for the British Admiralty in the year 1778, and, from the relative depths of water given, the existence of this same channel, extending out into the Gulf, southwest of Cat Island, is shown and is the same as noted on maps of subsequent years.

*48 February 14, 1839, an act of the legislature of Mississippi was * approved, providing for a survey of the Mississippi coast. The survey and report are given in full in the record, and the deep water channel above referred to is traceable in detail on the sketch. The channels indicated on this survey and on the United States Coast and Geodetic Survey map are the same channels. It may be noted, in passing, that the body of water now known as "Mississippi Sound," is not so designated on this sketch, and the first map which uses this name, to which our attention has been called, was issued in 1866.

Louisiana lies between the States of Mississippi to the east and Texas to the west. The southern portion of Louisiana is geologically of an alluvial formation, containing the delta of the Mississippi river. The peninsula of the parish of St Bernard is practically a part of this delta formation.

Mississippi's mainland borders on Mississippi Sound. This is an inclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them six miles wide. Such openings occur between Cat Island and Isle à Pitre; between Cat and Ship Islands; between Ship and Horn Islands; between Horn and Petit Bois Islands;

between Petit Bois and Dauphin Islands; and between Dauphin Island and the mainland on the west coast of Mobile Bay. The maps show all this, and, among others, reference may be made to Jeffrey's map of 1775, given in the record, and which in reduced form is reproduced from Jeffrey's Atlas of 1800 as the frontispiece of vol. II Adams' History of the United States.

Now to repeat, the boundary of Louisiana separating her from the State of Mississippi to the east is the thread of the channel of the Mississippi river, and this extends south until it reaches the thirty-first degree of north latitude and then runs directly east along that degree until Pearl river is reached; thence south along the channel of that river to Lake Borgne. Pearl river flows into Lake Borgne, Lake Borgne into Mississippi Sound and Mississippi Sound
*49 into the open Gulf of Mexico, * through, among other outlets, South Pass, separating Cat Island from Isle à Pitre.

If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

The term "thalweg" is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled "fairway" or "midway" or "main channel," the word itself has been taken over into various languages. Thus in the treaty of Luneville, February 9, 1801, we find "le Thalweg de l'Adige," "le Thalweg du Rhin," and it is similarly used in English treaties and decisions, and the books of publicists in every tongue.

In *Iowa* v. *Illinois,* 147 U. S. 1, the rule of the thalweg was stated and applied. The controversy between the States of Iowa and Illinois on the Mississippi river, which flowed between them, was as to the line which separated "the jurisdiction of the two States for the purposes of taxation and other purposes of government." Iowa contended that the boundary line was the middle of the main body of the river, without regard to the "steamboat channel" or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between States is the middle of the main channel of the river.

Mr. Justice Field, delivering the opinion of the court, said:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the rec-
*50 ognized treatises on international * law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, 'a line drawn along the middle of the river Mississippi from its source to the river Iberville,' as there used, is meant along the middle of the channel of the river Mississippi."

This judgment related to navigable rivers. But we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. 1 Martens (F. de), 2d ed. 134; Hall. § 38; Bluntschli, 5th ed. §§ 298, 299; 1 Oppenheim, 254, 255.

Thus Martens writes: "What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry."

So Pradier Fodéré says (Vol. II, p. 202), that as to lakes, "in communication with or connected with the sea, they ought to be considered under the same rules as international rivers."

The same view is confirmed by decisions of this court and of many arbitral tribunals.

In *Devoe Manufacturing Company,* 108 U. S. 401, the question at issue was in regard to the boundary line between New York and New Jersey under
*51 an agreement between the two * States. The jurisdiction of the State of New Jersey was claimed "to extend down to the bay of New York, and to the channel midway of said bay," and this court sustained the claim. See *Hamburg American Steamship Company* v. *Grube,* 196 U. S. 407.

In the San Juan Water Boundary controversy between the United States and Great Britain, Emperor William I gave the award in favor of the United States, October 21, 1871, by deciding "that the boundary line between the territory of Her Brittanic Majesty and the United States should be drawn through the Haro Channel;" and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister, and the British representative, the boundary line was said to be prolonged until "it reaches the center of the fairway of the Straits of San Juan de Fuca." The fairway was the equivalent of the thalweg.

Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the treaty of Ghent, the deep water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

So in the *Alaskan Boundary* case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line and included Wales Island, to the north of which the channel passed. This sustained the American contention in regard to the thalweg and the island lying south of it.

But counsel contend that the rule "as to the flow of the midchannel or thalweg of the river Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain expires by its own limitation when such midchannel reaches Lake Borgne, which in contemplation of the rule is the

*52 * open sea, and part of the waters of the Gulf of Mexico." This contention is inconsistent, as matter of fact, with the allegation of the cross bill that "the Mississippi Sound was recognized as a body of water six leagues wide, wholly within the State of Mississippi from Lake Borgne to the Alabama line, separate and distinct from the Gulf of Mexico," and with Mississippi's Exhibit Map A presenting her claim, while the record shows that the strip of water, part of Lake Borgne and Mississippi Sound, is not an open sea but a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth.

The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester* v. *Massachusetts,* 139 U. S. 240; *McCready* v. *Virginia,* 94 U. S. 391.

In *Manchster* v. *Massachusetts,* the court said: "We think it must be regarded as established that, as between nations, the minimum limit to the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self protection in time of war or for the prevention of frauds on its revenues, exercise an authority beyond this limit."

Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States require no special consideration here. The facts render such discussion unnecessary.

*53 Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, * to be "natural appendages of the coast on which they border, and from which indeed they are formed." *The Anna* (1805), 5 C. Rob. 373.

As to these particular waters, the observations of Mr. Hall, 4th ed. p. 129, are in point: "Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water."

He then states the specific case of the Archipiélago de los Canarios on the coast of Cuba, and says: "In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt water lake, and that the boundary of the land of Cuba runs along the exterior edge of the bank."

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary.

4. Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international * rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. *Virginia* v. *Tennessee,* 148 U. S. 503; *Indiana* v. *Kentucky,* 136 U. S. 479; *Missouri* v. *Kentucky,* 11 Wall. 395; *Rhode Island* v. *Massachusetts,* 4 How. 591.

*54

The Louisiana Enabling Act of February 20, 1811, provided that all the waste and unappropriated lands in said State should be and remain the property of the United States Government. In the disputed area of to-day are included lands and waters located in various townships, all of which are enumerated in the southeastern land district of Louisiana, east of the Mississippi river. The lands in these townships were surveyed by the Government about the year 1842, all of them as being in and forming part of the State of Louisiana. By the Swamp Land Grants of 1849 and 1850, the United States granted to certain States the swamp and overflowed lands within their respective limits, in order that these lands might be reclaimed, protected from overflow, and brought into use. Louisiana made application to the United States for the approval to her of these lands as being part of her territory and situated within her limits. They all lay south of the deep water channel and were all approved to the State of Louisiana May 6, 1852. They were then offered by the State through the register of the state land office for sale and many sales of them were made from time to time to individuals and patents issued therefor in various years from 1853 and 1894. In 1892, in furtherance of the better protection of the lands of the parishes of St. Bernard and Plaquemines from overflow, the legislature of Louisiana adopted an act which created a Lake Borgne Basin Levee Commission, and provided a board of commissioners therefor as a department of the state government, and the register of the state land office was authorized to transfer all of the unsold lands to the board, which was done in April, 1895. The board was authorized by law to sell these lands and also to levy taxes to be used in establishing a protective levee system in the district. The board made sales of a considerable number of acres * to different individuals from September 16, 1898, to March 7, 1902. Isle à Pitre was composed of certain enumerated sections of township ten, south of range twenty east, and these lands were approved to Louisiana by the Commissioner of the General Land Office of the United States May 6, 1852, as forming part of that State, and they were subsequently patented, sold and conveyed to various individuals, the chain of title extending from 1852, a period of over fifty years. The lands forming Isle à Pitre have been paying taxes to the State of Louisiana for years. Political and police control and jurisdiction by the parish of St. Bernard officials were exercised over the disputed area, and many instances are given of police control and jurisdiction by Louisiana officials over this general territory. This territory consisted, as heretofore stated, of what was known as the Louisiana Marshes,

*55

and it is admitted that they have immemorially been known by that name, though some of the witnesses for Mississippi said that they were also known as Grand Marshes, admitting, however, that they were quite as frequently called the Louisiana Marshes.

Some other matters may properly be referred to as showing the general understanding of and acquiescence in the boundary asserted by Louisiana.

In January, 1901, the Superintendent of the Coast and Geodetic Survey was applied to by a member of the House of Representatives from Mississippi for information in regard to the boundary line between Louisiana and Mississippi in the present disputed area, and Hodgkins, an assistant in the Department, a well-known expert in such matters, made a report January 30, 1901, which, after considering the subject in all its phases, showed that the correct boundary between the two States in the locality is the deep water sailing channel line contended for by Louisiana.

The United States Geological Survey published in the year 1900 a bulletin devoted to a discussion of the boundaries of the States and Territories, and giving a history of changes as they may have occurred. The third edition
*56 was published in * 1904. Gannett's Boundaries, 58th Congress, 2d Session, H. R. Doc. 678.

In the opinion of that Bureau, Louisiana was originally bounded by the deep water channel, and is the owner of the area in dispute to-day, according to the report and the accompanying sketches.

In 1897, Louisiana requested the United States Commission of Fish and Fisheries to make an investigation and report upon certain technical matters in connection with the oyster industry of that State, which investigation was made in February, 1898, by the United States Fish Commission steamer "Fish Hawk." A map was made of the area investigated in St. Bernard parish, and that map is given in the opening statement as Diagram No. 4. Louisiana's ownership was clearly recognized.

The General Land Office of the United States began as early as 1842 a detailed survey of the land forming the disputed area, of which township plats appear in the record. The survey gave the location of Marsh Island, Half Moon or Grand Island, an unnamed island, Petit Pass Island, and Isle à Pitre and the sections and townships comprised in these islands. They were all designated as being in the southeastern land district of Louisiana, east of the Mississippi river.

When, as we have said, Louisiana, in the year 1852, selected these and other lands within her state limits as enuring to her under the Swamp Land Grants, the General Land Office, on May 6, 1852, recognized the correctness of the claim to the lands and approved and patented them to her as a State. Mississippi also applied for the land enuring to her under the provisions of those grants, and received her swamp lands, but the State never selected and never had approved to her, as is shown by the books of the State Land Office of Mississippi, any of the lands in the disputed area of to-day; but it appeared that the State did have in her Land Office books a record of the lands forming St. Joseph's Island, which lay immediately north of the deep water channel, and did not extend south of that channel.

*57 * The General Land Office of the United States in all of the maps it has caused to be made of Louisiana and Mississippi has been consistent in

its recognition of the ownership by Louisiana of the disputed area. See maps of Louisiana, 1879, 1886, 1887, 1896; and of Mississippi in 1890.

As before stated, in 1839, an engineer and surveyor made a report and sketch of the coast of Mississippi under the authority of that State. This showed the territory lying south of the deep water channel in outline to be a peninsular formation. The report referred to Horn, Petit Bois, Cat and Ship Islands as belonging to Mississippi, all of which are east of the disputed territory; and the territory southwest of the deep water channel, or South Pass, was described as the Louisiana Marshes. The official maps of Mississippi recognized Louisiana's ownership of the disputed territory. The state map of October 26, 1866, which was approved by Governor Humphrey and also by Governor Alcorn, did this; and other maps, as the official map of Mississippi, published under an act of the legislature of that State on March 8, 1882; Rand & McNally's sectional map of Mississippi, compiled from the records of the office of the Surveyor General of the Board of Immigration and Agriculture, Jackson, Mississippi; and the Railroad Commissioners' map of Mississippi gave like recognition. The only exception seems to be a map of the Railroad Commission, issued in 1904, two years after this suit was instituted, wherein on the eighteen-mile theory, Mississippi for the first time cartographically extended her claims into the St. Bernard, Louisiana, peninsula.

The record contains much evidence of the exercise by Louisiana of jurisdiction over the territory in dispute, and of the general recognition of it by Mississippi as belonging to Louisiana. Apparently Louisiana had exercised complete dominion over it from 1812 with the acquiescence of Mississippi, unless the fact that the latter made a general reference to islands within six leagues of her shore in her code of 1880 indicated otherwise. But the evidence fails to satisfy us that she attempted any physical possession or control until after 1900. The
*58 few instances * referred to as showing that Mississippi asserted rights in the disputed area are of little weight and require no discussion.

Our conclusion is that complainant is entitled to the relief sought.

Decree accordingly.

State of Louisiana v. State of Mississippi.

Supreme Court of the United States, 1906.

[202 *United States,* 58.]

Defining the boundary line between the States of Louisiana and Mississippi under the opinion in this case. *Ante,* p. 1. [1481.]

PER CURIAM: This cause came on to be heard on the pleadings and proofs and was argued by counsel. On consideration thereof it is found by the court that the State of Louisiana, complainant, is entitled to a decree recognizing and declaring the real, certain and true boundary south of the State of Mississippi and north of the southeast portion of the State of Louisiana, and separating the

two States in the waters of Lake Borgne and Mississippi Sound, to be, and that it is, the deep water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass between Cat Island and Isle à Pitre, to the Gulf of Mexico, as delineated on the following map, made up of the parts of charts Nos. 190 and 191 of the United States Coast and Geodetic Survey, embracing the particular locality:

And it is ordered, adjudged, and decreed accordingly.

It is further ordered, adjudged and decreed that the State of Missis-
*59 sippi, its officers, agents and citizens, be and they are * hereby enjoined and restrained from disputing the sovereignty and ownership of the State of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map.

And that the costs of this suit be borne by the State of Mississippi.

State of Iowa v. State of Illinois.

Supreme Court of the United States, 1906.

[202 *United States,* 59.]

The boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river.

THIS cause came on for final decree and was submitted on the following stipulation:

"And now comes the State of Iowa, complainant in this cause, and also comes the State of Illinois, defendant in this cause, and severally and jointly move the court to vacate and set aside so much of the interlocutory order entered in this cause on the third day of January, A. D. 1893, as orders 'that a commission be appointed to ascertain and designate at said places the boundary line between the two States, said commission consisting of three competent persons to be named by the court, upon suggestion of counsel, and be required to make a proper examination and to delineate on maps prepared for that purpose the true line as determined by this court and report the same to the court for its further action': and also the interlocutory order entered in this cause on the seventh day of March, A. D. 1893; and also that part of the interlocutory order entered in this cause on the tenth day of April, A. D. 1893, which was not set aside and vacated
*60 by the interlocutory order * entered in this cause on the fifteenth day of January, A. D. 1894; and that that part of the interlocutory order entered in this cause on the third day of January, A. D. 1893, whereby it was 'ordered, adjudged, and decreed by this court that the boundary line between the State of

Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river,' be declared the final order, judgment, and decree of this court in this cause.

"CHAS. W. MULLAN,
"Attorney General of Iowa.
"W. H. STEAD,
"Attorney General of Illinois."

PER CURIAM: In consideration whereof and of the decision of this court reported 147 U. S. 1, it is ordered, adjudged and decreed that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river.

State of Missouri v. State of Illinois and the Sanitary District of Chicago.

Supreme Court of the United States, 1906.

[202 *United States,* 598.]

This court has power to allow costs in original actions and in any action between States, the successful State may ask for costs or not as it sees fit, and there is no absolute rule that in boundary cases the costs are divided. Costs, therefore, are allowed to the defendant in this suit in which the plaintiff alleged serious pecuniary damage, and framed its bill like the ordinary bill of a private person to restrain a nuisance.

The solicitor's fee of $2.50 for each witness examined before the examiner and admitted in evidence was properly allowed as fees for depositions under § 824, Rev. Stat.

THE question involved in the motion is stated in the opinion.

Mr. Erasmus C. Lindley for defendant, Sanitary District of Chicago.

Mr. Herbert S. Hadley, Attorney General of the State of Missouri, *Mr. Charles W. Bates* and *Mr. Sam B. Jeffries* for complainant.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a motion for the allowance and taxation of costs in the case reported in 200 U. S. 496. The costs asked are as follows:

$5,650 paid to the special commissioner.

$3,776.37 for taking down and transcribing the testimony of defendants' witnesses, etc.

*599 * $720 Solicitors' fees, viz., $20 for attendance at final hearing and $2.50 for each deposition taken and admitted in evidence, in accordance with Rev. Stat. § 824.

$10,146.37, total. The plaintiff objected to the allowance and the Clerk referred the matter to this court.

The only question of detail concerns the last item. The main objection is to the allowance of any costs at all. The power of the court to allow costs is not disputed. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 460. The former decree in this case allowed them, and in the stipulation for the appointment of a special commissioner the parties agreed that the costs should be "taxed by the court on the final disposal of the case, to be paid in such manner as the court may at that time determine." But it is said that it is inconsistent with the dignity of a sovereign State to ask for costs; that in boundary cases costs have been divided, and that the suit was not for a pecuniary interest, but only the performance of the duty of a sovereign to its citizens, for which no costs should be imposed.

So far as the dignity of the State is concerned, that is its own affair. The United States has not been above taking costs. *United States* v. *Sanborn,* 135 U. S. 271. As to the supposed rule in boundary cases, it is not absolute. But in many cases of that kind both parties are equally interested to have the boundary settled, and whichever State begins the suit both equally are actors. Thus counter-relief was asked by the defendants in *Nebraska* v. *Iowa,* 143 U. S. 359 and *Missouri* v. *Iowa,* 160 U. S. 688. As to the nature of this suit, the plaintiff alleged serious pecuniary damage to itself by the deposit of great quantities of filth upon the portion of the bed of the Mississippi alleged to belong to it, and, in short, framed its bill like any ordinary bill by a private person to restrain a nuisance. The chief difference was in the size of the nuisance alleged. There is no indication that the defendants desired or needed the determination of
600 this court, as States well might when their jurisdiction was in doubt.

So far as this point is concerned, there is no reason why the plaintiff should not suffer the usual consequence of failure to establish its case.

The only item specially discussed is the charge of $2.50 for each witness examined before the examiner, on the footing of "depositions" mentioned in Rev. Stat. § 824. There seems to have been made some difference of opinion in the lower courts as to whether testimony given before an examiner could be treated as a deposition. See *Strauss* v. *Meyer,* 22 Fed. Rep. 467; 1 Foster's Fed. Prac., 3d ed., 727, § 330. In favor of so treating it are *Ferguson* v. *Dent,* 46 Fed. Rep. 88; *Hake* v. *Brown,* 44 Fed. Rep. 734; *Ingham* v. *Pierce,* 37 Fed. Rep. 647; *The Sallie P. Linderman,* 22 Fed. Rep. 557; *Stimpson* v. *Brooks,* 3 Blatchf. 456. See also *St. Matthew's Sav. Bank* v. *Fidelity Casualty Co ,* 105 Fed. Rep. 161–163. The words of the statute are broad enough to embrace the testimony, unless they are taken very strictly, and the trouble to the parties in having to visit different places was similar to that caused by the taking of depositions adverted to by Judge Treat in *Strauss* v. *Meyer.* The case is quite distinct from that of testimony taken in court and reduced to writing by a reporter. We are of opinion that the item may be allowed.

Motion for costs allowed.

State of Kansas v. United States.

Supreme Court of the United States, 1907.

[204 *United States,* 331.]

Where the name of a State is used simply for the prosecution of a private claim the original jurisdiction of this court cannot be maintained.

Although a State may be sued by the United States without its consent, public policy forbids that the United States may without its consent be sued by a State.

THE facts are stated in the opinion.

Mr. Chiles C. Coleman, Attorney General of the State of Kansas, *Mr. Joseph H. Choate, Mr. James Hagerman, Mr. Adrian H. Joline, Mr. A. B. Browne, Mr. John Madden* and *Mr. Joseph M. Bryson* for complainant:

It is a sufficient answer to the motion of defendants to dismiss that the State of Kansas claims by its bill to be the owner of the legal title and to have the right to maintain the suit against all the defendants, including the United States, for the reasons set forth in the bill. This claim cannot be met by a motion to dismiss, but must be met by either plea, answer or demurrer, for in that way only can the State have an opportunity of a full hearing and consideration upon the
*332 merits, according to the principles of the rules of equity, which require * that the plea, demurrer or answer be set down for hearing and argument. *Sparrow* v. *Strong,* 3 Wall. 105; *Semple* v. *Hagar,* 4 Wall. 433; *Blythe* v. *Hinckley,* 180 U. S. 337; *Morning Star* v. *Cunningham* 110 Indiana, 328; *Ruddock* v. *Gordon,* Quincy (Mass.), 38.

The legal title to the lands granted is by the terms of the granting acts vested in the State of Kansas for the use and benefit of the Missouri, Kansas and Texas Railway Company by relation from the date of the grant, and this legal title of the State of Kansas to the granted lands in the Indian Territory has never been divested and is now vested in the State of Kansas.

The grants were *in præsenti* to the State of Kansas for the use and benefit of the railway company, effective from the dates of the grants, and attached, when the road was constructed, to the particular lands in controversy, and by the doctrine of relation the legal title of the State dates from the grants.

The United States and each one of the separate States may sustain the character of trustee, and have the legal capacities to take and execute trusts for every purpose. Perry on Trusts, § 41; *McDonald* v. *Murdock,* 15 How. 400; *United States* v. *Michigan,* 190 U. S. 379; *Van Wyck* v. *Knevals,* 106 U. S. 360 *et seq.*

In the case at bar it is the duty of the State of Kansas, as trustee for the railway company, to defend, uphold and protect the title which was granted to it and to see that the lands go to the beneficiary of the trust. The legal title did not pass to the railroad company upon the construction of the road. *Van Wyck* v. *Knevals,* 106 U. S. 360.

No patent has issued to the railway company, and hence the legal title conveyed by the granting act to the State still remains in the State. The State of Kansas is hence the indispensable party complainant and can pray the demanded relief.

*333 *Van Wyck* v. *Knevals, supra,* is direct authority that the * title to the granted lands is vested in the State of Kansas, for the land grant there construed is in practically the same words as §§ 1, 3 of the land grant of 1866 to the State of Kansas for the use of the railway company.

There is no Federal statute of uses, nor is there any Federal common law. The lands in question are not situated in Kansas or any other State. Under the decisions of the courts, both English and American, the statute of uses was never held to execute the trust or pass the legal title to the *cestui que trust* where the trust created was such that it was necessary that the trustee should continue to hold the legal title in order to carry out and effectuate the purposes of the trust. The statute of uses has never been considered to execute the trust where the trust was created for the express purpose of preserving a contingent remainder. Perry on Trusts, §§ 305, 309; *Biscoe* v. *Perkins,* 1 Ves. & B. 485; *Barker* v. *Greenwood,* 4 M. & W. 431; *Vanderheyden* v. *Crandall,* 2 Denio, 9; *Laurens* v. *Jenney,* 1 Spears, 365; *Co. Litt.,* 265 a. 2, 337 a. n. 2.

The provisions of § 3, even though they apply to the lands in the Indian Territory, in no way affect the grant to the State. *Van Wyck* v. *Knevals,* 106 U. S. 360, 364; *St. Paul & Pac. R. R.* v. *Northern Pac. R. R.,* 139 U. S. 1; *Langdeau* v. *Hanes,* 21 Wall. 521; *Wright* v. *Roseberry,* 121 U. S. 488.

This suit can be maintained in this court under the original jurisdiction clause of the Constitution. *United States* v. *Texas,* 143 U. S. 621; *United States* v. *Michigan,* 190 U. S. 379. The only difference is that the State is plaintiff and the United States defendant.

The Constitution of the United States is the Constitution of all the States speaking in a united sense, and this court, as the Supreme Court of the United States, is also, in the same sense, the Supreme Court for all the United States, having original jurisdiction in all cases of Federal cognizance "in which a State shall be a party." The language of the Constitution in this respect is broad and unqualified. Hence, the door does not here open to the United States
*334 against the * State and close against the State when the United States is sought to be made defendant. *Minnesota* v. *Hitchcock,* 185 U. S. 373.

If the element of express consent by the United States to be thus sued is essential, such consent has been given to individuals to thus sue the United States in all cases at law, in equity, or admiralty, not sounding in tort, by the act of March 3, 1887 (24 Stats., p. 505).

Under these statutes and the Constitution of the United States, the Government has not only impliedly but expressly given its consent to be sued in a case where a State is a party, in the Supreme Court of the United States. Suits may be instituted in the territorial district court against the Government under these statutes, although such territorial courts are not named in the act, under § 1910, Rev. Stat., which provides that each of the district courts in the Territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. *United States* v. *Forman,* 5 Oklahoma, 237; *Johnson* v. *United States,* 6 Utah, 403.

The Attorney General, The Solicitor General and *Mr. Assistant Attorney General Russell* for defendants:

The suit is not one of which this court has original jurisdiction. A State is not a party within the meaning of the Constitution, Article III, section 2.

The State of Kansas has no substantial interest in the subject matter, and is but nominally the complainant, the real party in interest being the railway company.

Legal title passed to the railway company, if to anyone, at the date of the grant, or at least upon the construction of the road. *Rice* v. *Railroad Company,* 1 Black, 358, 381.

A conveyance to trustees for certain purposes or uses carries the legal estate to the beneficiaries, unless duties imposed upon the trustees require the
*335 estate to be vested in * them. *Webster* v. *Cooper,* 14 How. 488, 499; *Long* v. *Long,* 62 Maryland, 65; Perry on Trusts, §§ 351, 352, 520, 521. This is the rule in Kansas. General Statutes of Kansas (1905), sec. 8624; *Bayer* v. *Cockerill,* 3 Kansas, 282, 292.

When an estate is given to trustees for a certain purpose, or until the happening of a certain event, the intermediate estate of the trustees terminates upon the accomplishment of the purpose or occurrence of the event. *Felgner* v. *Hooper,* 80 Maryland, 262; Perry on Trusts, section 351.

If "the purpose of aiding the railroad company to construct and operate a railroad," or the State's share therein, has been accomplished, then the trust has terminated and legal title is in the company; if it has not, then there is no cause for complaint.

But in this case the State was not even a trustee. It was no more than perhaps a repository in which the title might remain pending the performance of the condition of the grant, or a conduit through which the title might thereupon pass.

The granting act provides that patents shall issue, not to the State, but to the railroad company. Under such circumstances title vests in the company and not in the State. *Sioux City &c., Railroad* v. *United States,* 159 U. S. 349, 363, and cases cited; *Knepper* v. *Sands,* 194 U. S. 476, 481.

Patent not essential to transfer of legal title. It is simply evidence that conditions of grant have been complied with. *Deseret Salt Company* v. *Tarpey,* 142 U. S. 241. Title passes by the grant upon performance of its conditions, and being evidenced by patent, it passes to grantee to whom patent is to issue. By a proper construction of the granting act (sections 1 and 9), lands in Indian Territory were not granted to the State of Kansas. If granted at all, the grant as to them was to the railroad company direct.

In formal communications and protests by the railroad company to the Dawes Commission, the town-site commission, the Indian Agent, and the Secretary of the Interior, the tracts in question have been claimed by the com-
*336 pany invariably * heretofore as its own, without reference to any interest of the State therein. Of the counsel for the State two at least belong to the legal department of the railway company. Apparently the proceeding is under the control of the railway company and the name of the State is used simply for the purpose of prosecuting the claim of the company to the lands in question, the expense of the action being borne by the railroad. Under these circumstances the interest of the State is not sufficient to give this court original jurisdiction. *New Hampshire* v. *Louisiana,* 108 U. S. 76.

This is not a suit by a State exclusively against citizens of another State. Some of the parties defendant are citizens of the Indian Territory. A suit by a citizen of a Territory cannot be maintained under the Constitutional provision that jurisdiction of courts of United States shall extend "to controversies between citizens of different States." *Corporation of New Orleans* v. *Winter,* 1 Wheat. 92; *Downes* v. *Bidwell* 182 U. S. 244, 250.

Jurisdictional qualities must exist as to all parties in order to confer jurisdiction. *Great Southern Hotel Company* v. *Jones,* 177 U. S. 449.

The United States, the real party in interest as defendant, has not consented to be sued, and cannot be sued without its consent, even by a State.

The contention that, since a State without its consent may be sued by the United States, *United States* v. *Texas,* 143 U. S. 621, it follows that the United States without its consent may be sued by a State, is obviously unsound. The

question has been squarely decided. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 384; *Oregon* v. *Hitchcock,* 202 U. S. 60; *United States* v. *Lee,* 106 U. S. 196, 207.

It does not appear that all lands in controversy have been allotted, and the courts will not interfere with the Government in the disposal of land so long as the title in any sense remains in the United States. *Bockfinger* v. *Foster,* 190 U. S. 116; *Oregon v. Hitchcock, supra.*

*337 * It might be suggested, in passing, that in any event the grant was expressly limited to *public land*—that is, land which is subject to disposition under general laws, *Newhall* v. *Sanger,* 92 U. S. 761, and these lands in Indian Territory have never become such.

Mr. Chief Justice Fuller delivered the opinion of the court.

On April 30, 1906, the State of Kansas applied for leave to file a bill of complaint against the United States and others, to which the United States objected on the ground of want of jurisdiction. May 21 leave was granted, without prejudice, and the bill was accordingly filed. As such an application by a State is usually granted as of course, we thought it wiser to allow the bill to be filed, but reserving to the United States the right to object to the jurisdiction thereafter, and hence the words, "without prejudice," were inserted in the order. October 9 leave was granted to the United States to file a demurrer, and in lieu of this a motion to dismiss was substituted, which was submitted November 12 on printed briefs on both sides.

The bill was filed by the Attorney General of Kansas, on behalf of the State, as trustee for the Missouri, Kansas and Texas Railway Company, of certain lands in the Indian Territory, alleged to have been granted to the State for the benefit of the railway company.

It is stated by counsel for complainant, as appearing from the bill, that in 1866 "there were three Kansas railroad companies running through the State to the Indian Territory line. The first was the Union Pacific Railway Company, Southern Branch, since the Missouri, Kansas and Texas Railway Company, extending from Fort Riley, now Junction City, Kansas, in a southeasterly direction, down the valley of the Neosho River, to the southern line of the State of Kansas, near Chetopo, Kansas; the second was the Leavenworth, Lawrence and

*338 * Fort Gibson Railway Company, since conveyed to the Atchison, Topeka and Santa Fé Railroad Company, extending from Leavenworth, through Lawrence, to the northern line of the Indian Territory, near Coffeyville, Montgomery County, Kansas, in the direction of Galveston Bay, in Texas; and the third was the Kansas and Neosho Valley Railway Company, since the Kansas City, Fort Scott and Memphis, and now a part of the St. Louis and San Francisco Railroad Company, extending from a point of connection with the Union Pacific Railroad at or near the mouth of the Kansas River; thence southeasterly, through the eastern tier of counties, to the northern line of the Indian Territory, at or near Baxter Springs, in Cherokee County, Kansas."

On July 25, 1866, an act of Congress was passed entitled "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red River." 14 Stat. 236, c. 241. On the next day, July 26, an act was passed, using the same language, except as to the

routes, entitled "An Act granting lands to the State of Kansas to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph Company, from Fort Riley, Kansas, to Fort Smith, Arkansas," 14 Stat. 289, c. 270, which provided as follows:

"That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; . . ."

*339 * "SEC. 3. . . . And the lands hereby granted shall inure to the benefit of said company, as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; . . ."

"SEC. 8. *And be it further enacted,* That said Pacific Railroad Company, southern branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops, machine-shops, switches, side-tracks, turn-tables, and water-stations.

"SEC. 9. *And be it further enacted,* That the same grant[s] of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided,* That said lands become a part of the public lands of the United States."

The bill averred that the road was constructed through the Indian Territory, and set forth at length Indian treaties and Congressional legislation with reference to that Territory, under which it was alleged that the Creek Indian Nation had ceased to occupy or claim the lands in question as a tribe or nation, and that some of the lands had been allotted in severalty to individual members of the

*340 Creek Nation; and that thereby * said lands passed to the State under the provisions of the grant mentioned. It was prayed that a decree be entered adjudging the State to be the owner, as trustee for the railway company, of all odd-numbered sections of land to the extent of the grant along the line of the road through the Creek Nation, in the Indian Territory, and that the allottees be directed to surrender the possession to the State as trustee and be enjoined from disposing of said lands, or "in the event that from any equitable considerations the

court shall entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy," and that the United States be adjudged to pay to the State as trustee the sum of such values, estimated at more than $10,000,000.

In our opinion it appears upon the face of the bill that the State of Kansas is only nominally a party, and that the real party in interest is the railroad company. Section 3 provided that patents should be issued not to the State but to the company direct, which made the State nothing but a mere conduit for the passage of the title. And this is so even if it were ruled that the State of Kansas was made trustee under section 9, because it would only be trustee of the bare legal title. In very many cases "in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself," it has been held that the title vested absolutely in the railroad company. *Sioux City &c. Railroad Co.* v. *United States,* 159 U. S. 349, 363.

Title passed by the grant on the performance of its conditions and to the grantees to whom the patents were to be issued, and here section 3 provided that patents should issue not to the State but to the railroad company direct.

And if the lands in the Indian Territory could be held in any view to have been granted *in præsenti,* such grant was certainly not to the State of Kansas.

*341 * The road, in aid of which the grant was made to the State, extended no farther than the southern boundary thereof, and the patents were to be issued to the company. True, as declared in section 1, the road was to be constructed "with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas," and that extension was authorized by section 8, but the lands referred to in section 9 were not lands in the State of Kansas, nor was that State mentioned in the section. It seems clear that those lands were not intended to be granted to that State for the construction of a road beyond its boundaries.

Moreover, the bill sets forth many communications and protests by the railroad company to the Dawes Commission, the townsite commission, the Indian agent and the Secretary of the Interior, in all of which the tracts in controversy were claimed by the railroad company as its own without reference to any interest of the State of Kansas therein.

In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction can not be maintained.

Again, the United States is the real party in interest as defendant and has not consented to be sued, which it can not be without its consent. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387; *Oregon* v. *Hitchcock,* 202 U. S. 60; *United States* v. *Lee,* 106 U. S. 196, 207.

"If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

In the present case the parties defendant other than the United States
*342 and its officers are Creek Indian allottees and * persons claiming under them, and if their allotments should be taken from them, which is a part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, while the bill prays in the alternative that "in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values."

It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

In *United States* v. *Texas,* 143 U. S. 621, 646, it was held that the exercise by this court of original jurisdiction "in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States." That case was quoted from with approval in *Minnesota* v. *Hitchcock, supra,* where Mr. Justice Brewer, delivering the opinion, pointed out that the judicial power of the United States extends to cases in which the United States is a party plaintiff as well as to cases in which it is a party defendant, for "while the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy."

We are not dealing here with the merits of the controversy raised by
*343 the bill, but solely with the question of the original * jurisdiction of this Court. And as the United States has not consented to be sued, it results that on this ground also the bill must be dismissed.

And it is so ordered.

Mr. Justice Moody took no part in the disposition of this case.

State of Kansas v. State of Colorado, et al., Defendants, and the United States, Intervenor.

Supreme Court of the United States, 1907.

[206 *United States,* 46.]

Kansas having brought in this court an original suit to restrain Colorado and certain corporations organized under its laws from diverting the water of the Arkansas River for the irrigation of lands in Colorado, thereby, as alleged, preventing the natural and cus-

tomary flow of the river into Kansas and through its territory, the United States filed an intervening petition claiming a right to control the waters of the river to aid in the reclamation of arid lands. It was not claimed that the diversion of the waters tended to diminish the navigability of the river. *Held,* that:

The Government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of the powers granted is to be found in the Constitution of the United States, and in that alone; that the manifest purpose of the Tenth Amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and that if in the changes of the years further powers ought to be possessed by Congress they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the Territories and may control the flow of waters in their streams, it has no power to control a like flow within the limits of a State except to preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the State. Hence the intervening petition of the United States is dismissed, without prejudice to any action which it may see fit to take in respect to the use of the water for maintaining or improving the navigability of the river.

The controversy between the parties plaintiff and defendant is one of a justiciable nature. By the Constitution the entire judicial power of the United States is vested in its courts, specifically included therein being a grant to the Supreme Court of jurisdiction over controversies between two or more States.

In a qualified sense and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law. This court in appropriate cases enforces the principles of that law, and in addition by its decisions of controversies between two or more States is constructing what may not improperly be called a body of interstate law.

*47 * In a suit brought by a State which recognizes the right of riparian proprietors to the use of flowing waters for purposes of irrigation, subject to the condition of an equitable apportionment, against a State which affirms a public right in flowing waters, it is not unreasonable to enforce against the plaintiff its own local rule.

While from the testimony it is apparent that the diversion of the waters of the Arkansas River by Colorado for purposes of irrigation does diminish the volume of water flowing into Kansas, yet it does not destroy the entire flow. The benefit to Colorado in the reclamation of arid lands has been great, and ought not lightly to be destroyed.

The detriment to Kansas by the diminution of the flow of the water, while substantial, is not so great as to make the appropriation of the part of the water by Colorado an inequitable apportionment between the two States.

While a right to present relief is not proved and this suit is dismissed, it is dismissed without prejudice to the right of Kansas to initiate new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas River by the defendants, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States.

On May 20, 1901, pursuant to a resolution passed by the legislature of Kansas (Laws Kansas, 1901, chap. 425), and upon leave obtained, the State of Kansas filed its bill in equity in this court against the State of Colorado. To this bill the defendant demurred. After argument on the demurrer this court held that the case ought not to be disposed of on the mere averments of the bill, and, therefore, overruled the demurrer without prejudice to any question defendant might present. Leave was also given to answer. 185 U. S. 125. In delivering the opinion of the court the Chief Justice disclosed in the following words the general character of the controversy, and the conclusions arrived at (p. 145):

"The gravamen of the bill is that the State of Colorado, acting directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas River through its channel on the surface, and through a subterranean course across the State of Kansas; that this is threatened not only by the impounding, and the use of the water at the
*48 river's source, but as it flows * after reaching the river. Injury, it is averred, is being, and would be, thereby inflicted on the State of Kansas as an individual owner, and on all the inhabitants of the State, and especially on the inhabitants of that part of the State lying in the Arkansas Valley. The injury is asserted to be threatened, and as being wronged, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado in doing this is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

"The State of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream, and while she concedes that this rule has been modified in the Western States so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other States and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as neces-
*49 sary, whatever imperfections a close analysis of the pending * bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River in Kansas; whether what is described in the bill as the 'underflow' is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas River, the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof."

On August 17, 1903, Kansas filed an amended bill, naming as defendants Colorado and quite a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas River. Colorado and several of the corporations answered. For reasons which will be apparent from the opinion the defenses of these corporations will not be considered apart from those of Colorado. On March 21, 1904, the United States, upon leave, filed its petition of intervention. The issue between these several parties having been perfected by replications, a commissioner was appointed to take evidence, and after that had been taken and abstracts prepared, counsel for the respective parties were heard in argument, and upon the pleadings and testimony the case was submitted.

In order that the issue between the three principal parties, Kansas, Colorado, and the United States, may be fully disclosed—although by so doing we prolong considerably this opinion—we quote abstracts of the pleadings and statements thereof made by the respective counsel. Counsel for Kansas say:

*50 * "The bill of complaint alleges that the State of Kansas was admitted into the Union on January 29, 1861, that the State of Colorado was admitted on August 1, 1876, and that the other defendants are corporations organized, chartered and doing business in the State of Colorado; that the Arkansas River rises in the Rocky Mountains, in the State of Colorado, and, flowing in a southeasterly direction for a distance of about 280 miles, crosses the boundary into the State of Kansas; that the river then flows in an easterly and southeasterly direction through the State of Kansas for a distance of about 300 miles, then through Oklahoma, Indian Territory and Arkansas, on its way to the sea. Through the State of Kansas the Arkansas Valley is a level plain but a few feet above the normal level of the river, and is from two to twenty-five miles in width. Back to the foot hills on either side there are bottom lands which are saturated and sub-irrigated by the underflow from the river, and are fertile and productive almost beyond comparison. The Arkansas River is a meandered stream through the State of Kansas and under the laws and departmental rules and regulations of the United States it is a navigable river through the State of Kansas, and was, in fact, navigable and navigated from the city of Wichita south to its mouth; and that the complainant is the owner of the bed of the stream between the meandered lines, in trust for the people of the State; that the complainant is the owner of two tracts of land bordering upon the river, one at Hutchinson and one at Dodge City, upon which state institutions are maintained—one as a reform school and the other as a soldiers' home. That when the State of Kansas was admitted into the Union it became the owner for school purposes of sections 16 and 36 of each Congressional township, of which the complainant still owns many thousand acres, much of which borders on the Arkansas River. That by act of Congress of March 3, 1863, the complainant became the owner of each odd-numbered section of land in the Arkansas Valley, and has since conveyed the whole of this land for the

*51 purposes specified. That by the year 1868 * the land in the Arkansas Valley began to be taken by actual settlers, and by the year 1875 practically all the bottom lands in the east or lower half of the valley were entered and settled, and title obtained from the United States or the State of Kansas; and by the year 1882 the west or upper half of the valley was so entered and settled and like titles obtained. By the year 1873 a railroad was built through the entire length of the valley, and immediately after their settlement these bottom lands were extensively

cultivated, large crops of agricultural products were raised, towns and cities sprang up, population rapidly increased, and by the year 1883 practically all the bottom lands of the Arkansas Valley were in a state of successful and prosperous cultivation; that the waters of the Arkansas River furnished the foundation for this prosperity. These waters furnished a wholesome and ample supply for domestic purposes, for the watering of stock, for power for operating mills and factories, for saturating and sub-irrigating the bottom lands back to the uplands on either side of the river, so that crops thereon were not only bounteous but practically certain, and in the western portion of the valley these waters were appropriated and used for surface irrigation, to supplant the scanty rainfall in that region. That by reason of these uses of the waters of the Arkansas River, and the almost unvarying water level beneath these bottom lands being near the surface, the lands in the Arkansas Valley in the State of Kansas were of great and permanent value to the owners and settlers thereon, and those upon the tax rolls of the State of Kansas yielded a large and increasing revenue to the complainant for state purposes.

"That after the lands in the Arkansas Valley had been settled and raised to a high state of cultivation, all the bottom lands in the valley being riparian lands and directly affected by the presence and flow of the river, and after parts of the flow of the river had been used for manufacturing and milling purposes, and after the riparian lands had been largely and extensively irrigated in the valley
*52 of the river in the western portion of * Kansas, and after portions of the land so belonging to the complainant had been sold and conveyed, the State of Colorado and other defendants began systematically appropriating and diverting the waters of the Arkansas River, in the State of Colorado, between Cañon City and the Kansas State line, for the purpose of irrigating dry, barren, arid, non-riparian and non-saturated lands lying on either side of the river, and often many miles therefrom, and by the year 1891 all the natural and normal waters and a large portion of the flood waters of the Arkansas River were so appropriated and diverted and actually applied to these dry, barren, arid, non-riparian and non-saturated lands in the State of Colorado, said diversions increasing from year to year, as their means of diversion became more complete and perfect, so the average flow of the river was greatly and permanently diminished and the normal flow of the river, exclusive of floods, was wholly and permanently destroyed, and navigability of the river where navigable before has been ruined, the power for manufacturing purposes greatly diminished, the surface of the underflow beneath the bottom lands has been lowered about five feet, and the water for the irrigation ditches in the western part of Kansas has been entirely cut off. The loss sustained by the complainant and its citizens has been great and incalculable. The benefits of river navigation are gone; the cheap water power has been replaced by the costly steam power; the productiveness and value of the bottom lands have been greatly diminished; the irrigation ditches are left dry and the lands uncultivated, and the revenues of the State of Kansas and its municipalities have been materially decreased. Against this loss and injury the complainant prays the assistance of this court."

In the brief of counsel for Colorado it is said:

"The contention of the defendant, State of Colorado, as to the facts, may be concisely stated as follows: The Arkansas River, popularly so called, is sub-

stantially two rivers, one a perennial stream rising in the mountains of Colorado and flowing down to the plains, and this *Colorado* Arkansas, when the
*53 * river was permitted to run as it was accustomed to run, prior to the period of irrigation, poured into the sands of western Kansas, and at times of low water the river as a stream entirely disappeared. Its waters were to some extent evaporated, and as to the residue, were absorbed and swallowed up in the sands. So that from the vicinity of the state line between Kansas and Colorado on eastwardly, as far, at least, as Great Bend, if not farther, at such times of low water there was no flowing Arkansas River. Farther east, however, a new river arose, even at such times of low water, and partly from springs, partly from the drainage of the water table of the country supplied by rainfall, and partly from the surface drainage of an extensive territory, this river gradually again became a perennial stream, so that south of Wichita, and from there on to the mouth of the river, the *Kansas* Arkansas, as a new and separate stream, had a constant flow. Such, as the river was accustomed to flow, was the Arkansas of the period prior to irrigation. It was a 'broken river.' It is true that at all times in early years, and now, the Arkansas River at times of flood, or of what might be called high water, has a continuous flow from its source to its mouth, but a flow, even in times of flood or high water, which diminishes through the sandy waste east of the Colorado state line above described, so that oftentimes even a flood in Colorado would be completely lost before it had passed over this arid stretch of sandy channel, and high water would always be diminished in flow through the same stretch of country. This river is as if it were a current of water passing over a sieve; if the current be slow and the volume not excessive, all of it sinks through the sieve and none passes on beyond; when the current is rapid and the volume is large, still a large amount sinks in the sieve, and the residue passes on beyond.

"Now, the irrigators of Colorado have confined their actions to the *Colorado* Arkansas above described. They have taken the waters of the perennial stream before it reaches this sieve, through which it wasted; they have lifted that
*54 stream out of * the sandy channel in which it had flowed and applied it to beneficial uses upon the land; carried the body of it along at a higher level than where it was accustomed to run, and they finally restore it, practically undiminished in volume, so far as regards practical use, at points in the ancient channel farther east than the river at low water was accustomed to flow before the period of irrigation. The effect of the diversion of this water in Colorado, the carrying of it forward on a higher level, the return of waters, partly through seepage and partly through direct delivery at waste gates, and the effect of this process in extending eastward the perennial flow, will be fully discussed in the course of the argument to follow. It is sufficient in this preliminary statement to say that it is admitted by the complainant that in the course of a twelvemonth there is a vast amount of high and flood waters of the Arkansas that are never captured by man, that are of no use, but rather of injury to Kansas riparian proprietors, and, so far as any beneficial use is concerned, are absolutely wasted and lost. Kansas does not claim that she has not abundance of water in times of flood or in times of high water; her complaint is based upon the alleged fact that she does not have what she was accustomed to have in periods of low water, whereas, in fact, as contended by the State of Colorado, the diversion of water in Colorado into ditches and reservoirs, continuing, as it does, throughout the year, in times of flood and in times of

high water, has the effect, through seepage and return waters, to give perennial vitality to portions of this stream during what would otherwise be periods of depression or suspension of flow."

The substance of the petition in intervention is thus stated by counsel for the Government:

"The first paragraph of the said petition describes the Arkansas River from its source to its mouth, and alleges that it is not navigable in the States of Colorado and Kansas nor the Territory of Oklahoma, but is navigable in the State of Arkansas and the Indian Territory.

*55 "In the second paragraph it is alleged that the lands located * within the watershed of the river west of the ninety-ninth degree of longitude are arid lands.

"The third paragraph alleges that within said watershed there are 1,000,000 acres of public lands that are uninhabitable and unsalable.

"The fourth paragraph alleges that said lands can only be made habitable, productive, and salable by impounding and storing flood and other waters in said watershed to the end that the said waters may be used to reclaim said land.

"The fifth paragraph alleges that there is not sufficient moisture from rainfall to render the soil capable of producing crops in paying quantities in the watershed so described, and that they can only be made to produce crops by irrigation; that the common law doctrine of riparian rights is not applicable to conditions in the arid region and has been abolished by statute and by usage and custom; that there has been established in its stead in said region a doctrine to the effect that the waters of natural streams and the flood and other waters may be impounded, appropriated, diverted, and used for the purpose of reclaiming and irrigating the arid land therein, and that the prior appropriation of such waters for such purpose gives a prior and superior right to the water of the stream.

"The sixth paragraph alleges that legislation of Congress, decisions of courts, and acts of the executive department have sanctioned and approved the use of water for irrigation purposes in the arid region and that he who is prior in time is prior in right, and that it is recognized that the common-law doctrine of riparian rights is not applicable to the public land owned by the United States in the arid region.

"The seventh paragraph alleges that in accordance with and in reliance upon the doctrine of the use of water for irrigation purposes the inhabitants of the arid portion of the United States have appropriated and used the waters of streams therein to reclaim and make productive and profitable about 10,000,000 acres of land, which now support a population of many millions, and that the in-

*56 habitants of Colorado and Kansas * within the watershed of the Arkansas River have by irrigation from said river made productive and profitable about 200,000 acres of land, which provide homes for and support a population of many thousands.

"The eighth paragraph alleges that the common law doctrine of riparian rights is not applicable to riparian lands within the arid region, and that only by the use of waters of natural streams and flood waters for irrigation and other beneficial purposes can the lands in the arid region be made productive, and only by such use can additional areas be reclaimed and rendered productive and salable.

"The ninth paragraph recites the passage of the so-called reclamation act of June 17, 1902.

"The tenth paragraph alleges that about 60,000,000 acres of land belonging to the United States within the arid region can be reclaimed under the provisions of the so-called reclamation act.

"The eleventh paragraph alleges that the amount of land that can be so reclaimed will support a population of many millions.

"The twelfth paragraph alleges that under the operation of the said reclamation act 100,000 acres of public land can be reclaimed within the watershed of the Arkansas River west of the ninety-ninth degree west.

"The thirteenth paragraph alleges that the lands when so reclaimed will support a population of not less than 50,000.

"The fourteenth paragraph alleges that under the operation of the so-called reclamation act about $1,000,000 has been expended in exploring, procuring, and setting apart sites upon which reservoirs and dams contemplated by the act can be constructed and maintained; that contracts have been let for the construction of reservoirs, which, when completed, will cost over two millions and will have a storage capacity to reclaim 500,000 acres of arid land, which land when reclaimed will sustain a population of not less than 250,000; that plans are contem-
*57 plated for the expenditure of $20,000,000 under * said act, to irrigate about 1,000,000 acres of arid public lands.

"The fifteenth paragraph recites that there are $16,000,000 available under the so-called reclamation act.

"The sixteenth paragraph sets forth the contention of Kansas as seen in its amended bill of complaint, viz., that it is entitled to have the waters of the Arkansas River, which rises in Colorado, flow uninterrupted and unimpeded into Kansas.

"The seventeenth paragraph sets forth the contention of Colorado in respect to its claim of ownership, viz., that under the provisions of its constitution it is the owner of all waters within that State.

"The eighteenth paragraph is as follows:

" 'That neither the contention of the State of Colorado nor the contention of the State of Kansas is correct; nor does either contention accord with the doctrine prevailing in the arid region in respect to the waters of natural streams and of flood and other waters. That either contention, if sustained, would defeat the object, intent, and purpose of the reclamation act, prevent the settlement and sale of the arid lands belonging to the United States, and especially those within the watershed of the Arkansas River west of the ninety-ninth degree west longitude, and would otherwise work great damage to the interests of the United States.' "

Mr. C. C. Coleman, Attorney General of the State of Kansas, *Mr. S. S. Ashbaugh, Mr. N. H. Loomis* and *Mr. F. Dumont Smith* for complainant:

The State of Kansas may maintain this suit, first, by virtue of its own sovereignty; second, as the owner of the bed of the Arkansas River; third, as the owner of riparian lands in the Arkansas Valley; fourth, as *parens patriæ,* guardian, or trustee, for any considerable portion of its territory or citizens affected by any unlawful diversion of the waters of the river; and fifth, because its revenue
*58 derived from taxation has been directly * diminished by such diversion. Such cause is justiciable in this court, the defendants are each necessary and proper parties, and this court has jurisdiction and power to grant relief.

The jurisdiction of this court over the cause of action was exhaustively argued upon the demurrer, and was then practically decided. 185 U. S. 125.

The State of Kansas appears in all of its capacities known to the law, and alleges and has proved that its injuries have been brought about directly by the defendants named in the amended bill. One of these defendants is the State of Colorado, and the co-defendants are corporations and citizens of the State of Colorado. Thus, within the language of the Constitution, the court has original jurisdiction of the parties, and, because of the facts alleged and proved, the court has also jurisdiction of the subject-matter of the controversy.

The common law, including the doctrine of riparian rights as therein formulated, embraced the whole territory involved in this controversy down to August 1, 1876, when Colorado became a State. Many of the rights herein claimed became vested in the complainant and in those for whom it sues before that date, and all the rights claimed were prior and vested before the injuries complained of, and all ripened into a rule of property, and could not be changed or divested by subsequent customs or enactments in Colorado without the consent of the vested owners of those rights. *Clark* v. *Allaman,* 80 Pac. Rep. 571.

The court will take judicial notice of the settlement and development of Kansas; and that prior to 1868 its territory had become occupied, its lands had been established, and its institutions had become fixed. It must be also admitted that prior to 1868 the rule of the common law as to riparian rights in Kansas prevailed in all its vigor, and without any qualification whatever.

Kansas is a common law State so far as the doctrine of riparian rights
*59 is concerned, but, like the States of California, * Oregon, Washington, North and South Dakota, Nebraska, and Texas, has adopted a rule that will allow the largest development of its territory consistent with the rights of all its citizens.

Riparian ownership does not depend upon geographical lines, nor political subdivisions of land. Riparian lands, according to these authorities, are such as are directly affected by the presence of the river. The level of the underflow corresponds with the level of the water in the river back to the uplands, and, according to this rule every acre of land in the Arkansas Valley is riparian land, bought, sold, cultivated and its value fixed according to the volume of water in the river, and every principle of common law makes these lands riparian to the Arkansas River, and their owners riparian proprietors. Kansas insists upon the preservation of the doctrine of riparian rights within its own territory, but does not insist that the doctrine of riparian rights shall be extended over the territory of any arid State where its presence would not be suitable, and where its existence has been abrogated by the Constitution, the laws, and judicial decisions.

The defendants do not appear in this case, either in their answers or in the evidence adduced by them, as riparian owners along the Arkansas River, having full riparian rights, and demanding a reasonable and equal amount of these waters under the common law doctrine. They appear with a different system, under different laws, upon a different basis, using the water for a different purpose, all subsequent to the prior rights of the State of Kansas and its citizens, demanding the right to take the whole of the flow of the river and actually appropriating and using it all. They plead the new system of taking the water out and away from the river and putting it upon dry and arid lands, many miles from the river itself, and on land that never felt the effects of the river before, and on lands of which the waters of the river were never part nor parcel, and all this was done subsequent to the vesting of the prior rights in the State of Kansas and its citi-
*60 zens, and resulting * in the injuries hereinbefore enumerated. Thus, the common law rights of Kansas and its citizens have been invaded by a subsequent and different system, framed upon a different theory, and built upon a

different basis, and in a different State. These defendants now claim that they should be protected in their different and subsequent systems because they live and operate on the other side of the state line.

The right of the complainant and those for whom it sues is a right to the usual and normal flow of the river "as it was accustomed to run" during ordinary years prior to the unlawful diversion complained of, and exclusive of floods and unusual high waters.

The right of a riparian owner to the flow of the stream "as it is accustomed to run" in our judgment does not include extraordinary high waters, or floods, or times of unusual drought and low water. The words "as it is accustomed to run" mean in our judgment the normal or usual flow of the river from year to year. In the case of the Arkansas River this is not at all difficult to define. Let us illustrate. Before the unlawful diversion by Colorado there was always a season of high water in June, known as the June rise, caused by the melting snows in the mountains and foot-hills of Colorado, which gradually swelled the current until it was about bank full, at which stage it ran from four to six weeks, from whence it gradually subsided to its normal summer flow. This June rise was as regular as the recurrence of the seasons, not only in time but in volume. It was a part, in short, of the normal flow of the river, as distinguished from the extraordinary floods caused by unusual rainfall either in the mountains or uplands of Colorado or along the tributaries of the river in that State. Our contention is that the June rise was part of the normal flow of the river to which the riparian owners in Kansas were entitled. It fulfilled a great purpose in the economy of the Arkansas Valley in Kansas, filling the river from bank to bank, raising the water-level to a point where the pressure of the water was sufficient to bear in every direction.

*61 * The underflow of the Arkansas River in Kansas is a well-defined subterranean stream, distinct from underground or percolating waters, the right to which vests in the owner of the surface, and its unlawful diversion, deprivation or diminution is a substantial wrong, for which equity will grant relief.

The use of the water of the river for water power at Arkansas City became a vested right, and as to that right the subsequent diversion of the water by Colorado, decreasing if not wholly destroying such water power, is a continuing wrong which equity will enjoin. The water-power company at Arkansas City used the water of the river for power purposes under the authority of the common law, turning the water back into the Arkansas River after its use. The rights that were built up between the years 1881 and 1890 were property rights under the doctrine of the common law authorizing the diversion of the waters of the stream for these purposes. *Kimberly* v. *Hewitt,* 75 Wisconsin, 374; *Union Water Power Co.* v. *Auburn,* 90 Maine, 65. The right to use water of a river for furnishing power without diminution of its flow is a riparian right which attaches to the land. It vests in the ownership of the land, and as such it cannot be injuriously affected by the upper riparian owner, as has been done in this case by the diversion of the water in Colorado.

The rights of Kansas and those for whom it sues accrued and were vested prior to the existence of Colorado as a State. When, on August 1, 1876, the territory of Colorado was erected into one of the States of the Union and became a political sovereignty, a greater portion of the Arkansas valley had been settled. They had settled upon and bought their lands from the Government and other settlers because of the flow of the Arkansas River, because of the great advantages to be found in this valley, that are set forth in our testimony. They bought under the common law, which attached to all of this territory, and fixed and defined the rights of every landowner from Arkansas City to the Rocky Moun-

tains. These rights so acquired were as sacred to each of these owners as
*62 the right * to life or liberty. No court, no State nor the Federal Government, could in any wise impair those rights. 1 Farnham on Waters and Water Rights, p. 29; *Pine* v. *New York,* 112 Fed. Rep. 98; *Holyoke Water Co.* v. *River Co.,* 22 Blatch. 131; *S. C.,* 20 Fed. Rep. 71; *Ruz* v. *St. Louis,* 7 Fed. Rep. 438; *Howell* v. *Johnson,* 89 Fed. Rep. 556; *Hoge* v. *Eaton,* 135 Fed. Rep. 411; 4 Am. Law Register, 385.

Mr. N. C. Miller, Attorney General of the State of Colorado, *Mr. Joel F. Vaile* and *Mr. Clyde C. Dawson,* with whom *Mr. Charles D. Hayt, Mr. Platt Rogers, Mr. C. W. Waterman, Mr. F. E. Gregg, Mr. W. R. Ramsey* and *Mr. I. B. Melville* were on the brief, for the State of Colorado:

The Arkansas River, *ut currere solebat,* has always been an intermittent stream, and, in times of low water, has been a "broken river."

From the earliest times the Arkansas River through Western Kansas has been merely a bed of sand, with practically no flowing water during a large part of the year, and this strip of bare sand bed separates the perennial Arkansas of Southern Kansas from the perennial Arkansas of Colorado during all times of low water, making a "broken river." This fact is so thoroughly established by written history and oral testimony as to preclude any possible refutation.

The diversion and use of the waters of the *Colorado* Arkansas have not diminished the "low water" flow of the river in Kansas.

The diversion and use of the waters of the *Colorado* Arkansas have not caused the bed of the stream in Kansas to be narrowed, nor islands to form therein, nor the dangers from flood to increase.

Colorado, relying upon its right to utilize the waters of its natural
*63 streams upon adjacent lands, has converted arid and * uninhabited wastes into populous districts, with productive farms and thriving towns and industries.

Colorado is essentially an arid State, and, except in isolated places, irrigation is absolutely necessary to the successful cultivation of the land.

Even if Kansas possesses riparian rights to the full extent claimed by her, yet she has no right of action in the absence of injury, inflicted or threatened.

The evidence has been taken. We respectfully insist that absolutely no injury has been shown. This is not even a case of *damnum obsque injuria,* because we may fairly say that no damage has been proved to result in the slightest degree from Colorado irrigation in any of the particulars alleged in the amended bill. See *Missouri* v. *Illinois,* 200 U. S. 496.

The owners of lands bordering on the Arkansas River in Kansas have no vested rights in the Arkansas River which complainant as *parens patriæ* can assert against the defendants. Angell on Watercourses, 7th ed., § 5; *Tyler* v. *Wilkinson,* 4 Mason, 397; *Tomlin* v. *Dubuque, &c. R. R. Co.,* 32 Iowa, 106; *People* v. *Appraisers,* 33 N. Y. 461; *Wood* v. *Fowler,* 26 Kansas, 682; *Crawford* v. *Hathaway,* 93 N. W. Rep. 781.

Under the principles of the common law which have resulted in the doctrine of "riparian rights," the inhabitants of arid lands along the upper reaches of the Arkansas River have a prior right *ex jure naturæ* to the beneficial use of its water to the full extent required for their adequate sustenance and welfare. Riparian rights at common law include the right to irrigate riparian lands. *Clark* v. *Allaman,* 80 Pac. Rep. 571, 584; *Crawford Co.* v. *Hathaway* (Neb.), 93 N. W. Rep. 781; *S. C., Crawford Co.* v. *Hall* (Neb.), 60 L. R. A. 889, 897; *Weston* v. *Alden,* 8 Massachusetts, 135, 136. See also *Anthony* v. *Lapham,* 5 Pick. 175;

Elliott v. *Fitchburg R. R. Co.,* 10 Cush. 191, 194; *Hazeltine* v. *Case,* 46 Wisconsin, 391, 394; *Evans* v. *Merriweather,* 3 Scam. (Ill.), 492, 496; *Wadsworth* v. *Tillotson,* 15 Connecticut, 366; *Rhodes* v. *Whitehead,* 27 Texas, * 304, 310; 30 Am. & Eng. Enc. of Law, 2d ed. (b), 358, and authorities cited in Note 1, 359.

*64

To hold that under given conditions the natural wants of man may justify him in diverting a watercourse for the irrigation of his arid lands is not a departure from the common law. It is a question of the proper application of the principles of the common law. The common law recognizes clearly the right to irrigate as a riparian right. The question of the rank of that right as compared with other uses is a question to be determined by circumstances and conditions, and the necessities of humanity. The common law, by its very nature, and the principles which compose it, looks to these special circumstances to determine the scope and limitation of a general rule when applied to a particular case. Many authorities say that in America we have adopted the common law of England, only so far as it is suited to the conditions and wants of our people, even though the expressed letter of the statutory adoption may be more strongly expressed. All such statements of the rule sustain also the doctrine that in construing the common law as to its application, we should, within the reasonable limits of the general principles involved, be guided by the conditions and wants of the people. *Van Ness* v. *Pacard,* 2 Pet. 137, 144, 145; *Wheaton, et al.* v. *Peters, et al.,* 8 Pet. 591, 659.

In view of the condition and wants of the people of the arid section of the United States, the use of water in the irigation of lands takes the rank of a necessary use, affected by the same rules as apply to other necessary uses of humanity as recognized by the common law.

The Solicitor General, Mr. Assistant Attorney General Campbell and *Mr. A. C. Campbell,* with whom *The Attorney General* was on the brief, for the United States:

The United States does not agree with either State. Their powers of internal police are exhausted at the boundary, and yet the effects are claimed to pass beyond. There is a conflict * which only the national sovereignty is competent to settle.

*65

Assuming that there is power somewhere outside the two States to adjust the dispute, the principle of law to be found and applied will inaugurate a new law of waters on interstate streams—that is, on main streams which actually cross state lines. The strict common law rule of riparian rights cannot control this new law for the arid region. The common law would not be the pervading and permanent institution which it is if it had not contained the seeds of growth and free development; not to break down constitutions and laws, but to adapt them to new times, places and conditions. *Hurtado* v. *California,* 110 U. S. 516, 531; *Woodman* v. *Pitman,* 79 Maine, 456.

Irrigation was always a common law use, and a "new combination" of the common law is taking shape here, because the doctrine of reasonable use is qualifying the unrelieved common law rule. In *Clark* v. *Nash,* 198 U. S. 361, 370, the court approved the idea of an evolution of law to meet the new conditions and necessities of irrigation.

In Wyoming, under a clause in her constitution, similar to the Colorado law, it is not now maintained that the upper State can take all the water of an interstate stream regardless of prior appropriators in the lower State. The claim means in the last analysis the right to make war, which with the right of compact

was surrendered by the States. The very fact that the controversy is justiciable here is proof that Colorado cannot do as she sees fit without accountability. She is a sovereign State of this Union, but not a sovereign nation. There is a higher sovereignty. "All the States have transferred the decision of their controversies to this court." *Rhode Island* v. *Massachusetts,* 12 Pet. 743.

The fundamental question is whether power exists anywhere to compose this dispute. This court is a branch of the sovereign power of the Nation. It has taken jurisdiction of such controversies between States under its constitu-
*66 tutional * grant of authority, and has acted upon them with conclusive effect.

The people rest confidently on the power and competence of the court always to adjust any controversy between States coming within its jurisdiction as defined by the Constitution and statutes. But the court is not a legislature. Beneath the judicial jurisdiction, and controlling it, there appears always the inquiry as to the basis in power and competence for national intervention in any form.

In *Missouri* v. *Illinois,* 200 U. S. 496, the scope of the decision was carefully restricted; nothing was intimated as to Federal power in such a controversy; but it is noted that Congress had not acted on the matter, and an obvious inference is that the sovereign power of Congress as well as the sovereign power of this court might deal with such a controversy.

Commerce is intercourse; the word imports intercourse in the broadest sense. *Gibbons* v. *Ogden,* 9 Wheat. 189. That is the tendency of later decisions of the court following Marshall's definition. The word in its wide signification means all sorts of communications and correspondences, dealings, comminglings and interchanges. Commerce is not restricted to trade and traffic, or navigation or transportation; no one can now say definitely what movements and interactions across state lines may not be embraced within its meaning. When to the power over interstate commerce, so regarded, the powers necessary to carry that power into effect are added, it may well be that conflicting irrigation rights between two States on the waters of a stream passing from one State to another involve the power over interstate commerce. Water is sold for irrigation and flows downstream and along ditches to the point of delivery.

But assuming for the purpose of argument, without at all conceding, that this case does not clearly fall within an enumerated power and the implied powers necessary to effectuate it, there is the doctrine of sovereign and inherent power.

Advancing that doctrine may seem to challenge great decisions of the court,
*67 but it is more than a theory. It is well recognized. * It is indeed established, although its full development is of recent date; and in clear and concrete form it has perhaps only been applied once. And first it must be said that there is no sharp line betwen implied powers and inherent powers. The expansion of implied powers and the existence of inherent powers lie close together.

"This Government is acknowledged by all to be one of enumerated powers." Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 405. "The Government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." Story in *Martin* v. *Hunter's Lessee,* 1 Wheat. 326. "The Government of the United States is one of delegated, limited, and enumerated powers." *United States* v. *Harris,* 106 U. S. 635. Yet Marshall also said in the same passage: "But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist." And Story said it could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present

might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms. *Martin* v. *Hunter, supra.* See Marshall, Ch. J., in *Gibbons* v. *Ogden,* 9 Wheat. 195, and Mr. Justice Wilson in his speech at the Pennsylvania Constitutional Convention of 1787, 1 Andrews' "Works of James Wilson," 533. Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power, but which are resulting powers arising from the aggregate powers of the Government. *Second Legal Tender Cases,* 12 Wall. 457, 534; and see also 110 U. S. 421.

There can be no more obvious and necessary occasion for invoking the doctrine of inherent sovereignty and of implied powers (resting on Chief Jus-
*68 tice Marshall's reasoning) than * where there is a conflict of law and interest between two or more States. The "resulting powers" of Judge Story would most properly take effect there.

Whatever the particular matter of internal police may be, the respective "rights" or jurisdiction involved, whether Federal or state, should be measured by the test whether they concern only the rights of a State or its citizens within a State, or affect other States and their citizens and the citizens of the United States in general. The power of a State is restricted to its own organism and function as a separate entity of government.

Where state antagonism to another State or the Nation begins, the state sovereignty ends, and that is at just the point where the matters of exclusive regulation within the state boundaries, the things done by or in the State, tend to pass over into the other limited sovereignties, and then the exclusive power, the reserved power, falls, or rather stops. The problem, then, does not involve the taking away prerogatives from a State wholly operating within its own confines, but only involves the taking up these prerogatives at the state lines and supplementing them by national coöperation or control so as to amalgamate or reconcile the separate forces. There is a gap and vacancy of sovereignty somewhere if the sovereign and inherent power of one State is restricted to its own territory (which of course it is), and there is no sovereign and inherent power in the Nation to regulate where the powers of two or more States overlap, and so clash, and injure each other and the aggregate interests. This entails no loss of powers reserved to the States; if it does we are in a vise—both the States and the Nation powerless at the very point where competent power is most essential.

This element of sovereign power was never reserved to the States. In the nature of things it could not have been, being the power to restrain the state authority when by its necessary effect it passed beyond its own borders. This was the very pretension, or the very danger, rather, which all the States
*69 wished to put down in order that one State should not become prepotent. "Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not." *McCulloch* v. *Maryland,* 4 Wheat. 431.

Would Federal administration and control of irrigation on interstate streams, subject to regard for the different state laws as directed by Congress, and always subject to the power and jurisdiction of this court to pass upon interstate controversies, encroach in any respect upon the powers reserved to the States or the people? The powers reserved to the States are powers confined wholly to their respective borders. The powers reserved to the people relate to possible encroachments on their personal and individual rights of life, liberty, and the pursuit of happiness. At least the language of the Tenth Amendment cannot reasonably mean that the underlying sovereignty of the people has thereby withheld

from the sovereignty which they have created an essential branch of national power without which the Government is not completely sovereign within its sphere—essential because neither the separate States nor the people at large can deal with it effectively or indeed at all. *McCulloch* v. *Maryland,* 4 Wheat. 406. The function and power of the Government, on the legislative and executive side, in reference to the distribution of the flow of the Arkansas River, are involved in this case.

The decree should embrace in terms or in effect a recognition of the national law and of the Government's right to direct the matter of water distribution on this non-navigable interstate stream.

The great principle here and whenever it is a question of conflict between States or between a State and the Nation is that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. The powers of Congress are not given by the people of a single State; they are given by
*70 the people of the United States to a * Government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. *McCulloch* v. *Maryland,* 4 Wheat. 426, 429.

As to the particular facts involved, the petition for intervention alleged, and the evidence shows, that within the watershed of the Arkansas River in Colorado and Kansas there are about one hundred thousand acres of public arid land, which can only be reclaimed and made habitable by the application thereto of the waters of said stream; that in the arid region of the United States from sixty million to one hundred and fifty million acres of public land now valueless and uninhabited may be reclaimed by irrigation and made to sustain a population of one hundred million persons; that within the forty-seven Indian reservations within the arid region, which reservations aggregate forty-eight million acres, there are located about one hundred and sixteen thousand Indians; that to support them it is necessary to irrigate lands within the reservation; and that the Government is assisting the Indians in reclaiming them.

That over ten million acres of land originally arid have already been reclaimed by irrigation at a cost of over two hundred million dollars, and are greater in extent than all the cultivated lands within the New England States. That these lands and improvements are worth not less than five hundred million dollars and support directly and indirectly over five million persons. Of these ten million acres, at least two million are in the State of Colorado, and they are capable of raising crops of the value of over forty million dollars annually. Within the watershed of the Arkansas River in Colorado there are over three hundred thousand acres of irrigated land, and in the same watershed in Kansas, about thirty thousand acres.

The relief sought by complainant would require a decree of the court, the principle of which if enforced would be to prevent the reclamation and cultivation of any of the public lands within the arid belt and have the effect of return-
*71 ing to * their original condition lands which have already been reclaimed. A decree sustaining Colorado's contention to the effect that it has "plenary and exclusive right and power to control and regulate the use of non-navigable streams within its boundaries," whether state or interstate, would have the effect, if the doctrine on which it was based was enforced, of measureably limiting the amount of arid lands which would otherwise be reclaimed. In view of these facts, and the further fact that the Government by the so-called Reclamation Act of June 17, 1902, 32 Stat. 388, had adopted a scheme to reclaim its arid lands by irrigation, its

interests will undoubtedly be affected one way or the other by any decree or judgment of the court. Hence it has the right to intervene and be heard "before the judgment is given," although it is not to be recognized as a party to the suit, in a technical sense, or entitled to any decree in its favor. *Florida* v. *Georgia,* 17 How. 478, 495.

As intervenor, the Government admits that the court has jurisdiction of the subject matter of the action. It denies that Kansas owns the bed of the river in said State. It contends that only the shores and beds of navigable waters are reserved to the State by the Federal Constitution, and that within the definition of navigable waters, as set forth in the case of *The Daniel Ball,* 10 Wall. 557, 563; and approved in the cases of *The Montello,* 20 Wall. 430, 439; *Escanaba Company* v. *Chicago,* 107 U. S. 678, 682; *Miller* v. *New York,* 109 U. S. 385, 395; *Packer* v. *Bird,* 137 U. S. 661, 666; *Leovy* v. *United States,* 177 U. S. 621; *Wood* v. *Fowler,* 26 Kansas, 682; and Farnum on Waters, 67; the Arkansas River is not navigable in Kansas, hence the abutting owners on the stream when they obtained title from the Government, also acquired title to its bed. See *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 286, 287; *Whittaker* v. *McBride,* 197 U. S. 510; *Indiana* v. *Milk,* 11 Fed. Rep. 389; *Steinbuchel* v. *Lane,* 59 Kansas, 7; § 2476, Rev. Stats.

*72 The evidence shows that the use of the waters of the stream * in Colorado for irrigation purposes has not interfered with its navigable capacity where navigation is a recognized fact, hence no duty devolves upon the intervenor to aid complainant in securing a decree to enjoin Colorado from using the waters to the end that navigation be protected and preserved. *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 709.

It is indispensable to the future growth and prosperity of the Nation that the public arid lands be reclaimed and cultivated. "Man and the Earth," by Shaler, 73, 74, 120; "Water and Water Rights," 3 Farnum, 1895*a*. And public policy, which is but the manifest will of the people of the Nation, and which is seen in public acts, legislative, executive and judicial, and which varies with the habits, capacities, opportunities and needs of the people, recognizes that the arid lands in the largest measure possible should be reclaimed, settled and cultivated. *Wakefield* v. *Van Tassell,* 66 N. E. Rep. 830; *Lux* v. *Haggin,* 10 Pac. Rep. 674, 702; *Giant Powder Company* v. *Oregon &c.,* 42 Fed Rep. 470, 474; *Jacoby* v. *Denton,* 25 Arkansas, 625, 634; *St. Louis Mining Company* v. *Montana,* 171 U. S. 650, 655. See acts of July 26, 1866, 14 Stats. 253; July 9, 1870, 17 Stats. 218; March 3, 1877, 19 Stats. 377; March 3, 1891, 26 Stats. 1096, 1101; August 4, 1894, 28 Stats. 422, sec. 4; June 17, 1902, 32 Stats. 388; also Executive Messages, Cong. Rec., 57th Cong., 1st sess., vol. 35, pp. 85, 86; 2d sess., vol. 36, p. 11; 58th Congress, 2d sess., vol. 38, p. 7, vol. 39, p. 14; and 59th Cong. vol. 40, p. 100; also *Atchison* v. *Petersen,* 20 Wall. 507, 513; *Basey* v. *Gallagher,* 20 Wall. 670, 681, 682; *Tartar* v. *Spring Creek Co.,* 5 California, 397; *Jennison* v. *Kirk,* 98 U. S. 453, 460; *Broder* v. *Water Company,* 101 U. S. 274, 276; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *United States* v. *Rio Grande Co.,* 174 U. S. 690; *Gutierres* v. *Albuquerque L. & I. Co.,* 188 U. S. 545; *Clark* v. *Nash,* 198 U. S. 361.

Under the strict common law doctrine of riparian rights a riparian owner is entitled to have the stream come to him in its natural state in flow, quan-

*73 tity and quality, and it must go from * his land in like manner, unobstructed in its passage, Col. Law Review, No. 8, p. 505. He has a natural and equal right to the use of the water in the stream adjacent to his land without diminution or alteration. He only can employ or suffer the employment of the waters for any purpose. *Lux* v. *Haggin,* 10 Pac. Rep. 674, 755. The California doctrine permits

a reasonable use of the water of a stream to irrigate riparian lands. What is a reasonable use and what are riparian lands have never been clearly defined by the courts which have approved this doctrine. Upon neither question can the decisions of the courts be harmonized or reconciled. See *Lux* v. *Haggin, supra; Gould* v. *Eaton,* 117 California, 539; *Katz* v. *Walkinshaw,* 70 California, 663 and 74 California, 735; *Crawford* v. *Hathaway, supra,* and *Clark* v. *Alleman,* 80 Pac. Rep. 571; Irrigation Institutions (Mead), 322, 323. The common law doctrine of riparian rights does not exist in Colorado. The doctrine which has been established there is that of appropriation of the waters of streams and the application of the same to beneficial use. See Colorado Constitution, art. 16, sec. 5; *Coffin* v. *Left Hand Ditch Co.,* 6 Colorado, 443, 447. A State has the right to change the common law rule in respect to the waters of streams within its boundaries, subject to the following limitations: *First.* That in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial use of the government property. *Second.* That it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. *United States* v. *Rio Grande, &c. Co., supra,* p. 703. In Kansas the California doctrine prevails. *Clark* v. *Allaman, supra.* The doctrine which has been established in Colorado and the doctrine which seems to prevail in Kansas are in conflict with each other and both cannot be enforced in
*74 respect to the waters of the Arkansas River. * *Stowell* v. *Johnson,* 26 Pac. Rep. 290; Works on Irrigation, 17.

The evidence clearly establishes the proposition that the application of either the strict common law doctrine of riparian rights or the so-called California doctrine to the waters of streams in the arid region, state or interstate, would have the result of preventing the reclamation and cultivation of public arid lands and defeat the policy of the Government with respect thereto and would obstruct the administration of the so-called Reclamation Act of June 17, 1902. The evidence further shows that should it be held as contended for by Colorado that a State by reason of its sovereignty has absolute control of and dominion over the waters of an interstate stream while the same are within its boundaries the ultimate effect would be in large measure to prevent the reclamation and cultivation of the public arid lands. But irrespective of the effect of such doctrine the same is untenable as a matter of law. *New Hampshire* v. *Louisiana, et al.,* 108 U. S. 76, 90; *Pine* v. *New York City,* 112 Fed. Rep. 98; *S. C.,* 185 U. S. 93; *Howell* v. *Johnson,* 89 Fed. Rep. 556; *Perkins* v. *Groff,* 114 Fed. Rep. 441; *Morris* v. *Bean,* 123 Fed. Rep. 618; *S. C.,* 146 Fed. Rep. 423; *Miller & Lux* v. *Rickey,* 127 Fed. Rep. 573; *Anderson* v. *Bassman,* 140 Fed. Rep. 10; *Willey* v. *Decker,* 73 Pac. Rep. 210.

Each State has certain rights to the waters of an interstate stream. The right of either cannot be destroyed by the other. Manifestly the law of neither State extends beyond its boundaries. Neither Colorado nor any of its citizens can by legal proceedings in Kansas acquire the right to appropriate the waters of a stream in Colorado. *Pine* v. *New York City,* 185 U. S. 105. When, therefore, a dispute arises in respect to the waters of an interstate stream, such as involved in the present proceeding, the question to be determined is, What rule of law shall be applied, and what tribunal has the power to enforce the rule? The Government contends that this court has the power to find, apply and to en-
*75 force the * proper rule. That it should find the same outside of the law of either State, not within the common law doctrine of riparian rights, strict or

modified, but within the maxim *salus populi est suprema lex.* The rule to be applied should be one capable of enforcement and of uniform application in both States. The rule which meets the requirements is not "water runs; let it run;" but that "water irrigates; let it irrigate." In other words, that such waters may be appropriated and used to irrigate land within the watershed of the stream, "leaving, however, sufficient in or returning sufficient to the beds of the streams for domestic, household and stock purposes," subject, also, to the limitation that priority of time of appropriation determines priority of right, irrespective of state lines. The application and enforcement of such rule will not interfere with any vested right of the State of Kansas or any of its citizens, such as are protected by the Federal Constitution, for the reason that the superior rights of riparian owners to the waters of a stream in the arid region are not the same as in the humid belt (*Clark* v. *Nash,* 198 U. S. 361, 370) and of necessity are limited to the use of such waters for domestic purposes, which include, of course, water sufficient for live stock purposes. The evidence in the case shows that the use of the waters above for irrigation purposes, if confined within the watershed of the stream, returns to the stream by seepage sufficient water for domestic purposes below. This being the effect of irrigation above the superior right to riparian owners below is not affected. While the Constitution prohibits the practical destruction or material impairment of property (*Manigault* v. *Springs,* 199 U. S. 473), yet, generally speaking, the evidence in this case shows that irrigation above neither destroys nor materially impairs riparian lands below.

In respect to the so-called "underflow," the evidence of the government witnesses shows that it is percolating waters and not a subterranean stream; further, that its source is rainfall and not the river.

*76 Sub-surface waters are presumed to be percolating waters, * hence the burden of proof to show that they flow in a well defined channel is upon the party who denies that they are percolating waters. *Barclay* v. *Abraham* (Iowa), 64 L. R. A. 255. Where the common law doctrine of riparian rights prevails, subterranean waters when they flow in a well defined channel are subject to the same rules of law as surface streams. Percolating waters belong to the owner of the land underneath which they are found, and adjacent landowners have no correlative rights to them. *Ohio Oil Company* v. *Indiana,* 177 U. S. 190, 204, 207. In those localities where the doctrine of the appropriation and use of waters for irrigation purposes exists the law in respect to subterranean waters is the same as in respect to surface waters. See "Water Rights in the Western States," by Wiel, §§ 77, 78; *Katz* v. *Walkinshaw,* 64 L. R. A. 236; Long on Irrigation, § 33.

In the State of Kansas subterranean waters may be appropriated and used for irrigation purposes. See General Statutes of Kansas, 1901, §§ 3631, 3632, 3633.

Mr. David C. Beaman, with whom *Mr. Cass E. Herrington* and *Mr. Fred Herrington* were on the brief, for the defendant, The Colorado Fuel & Iron Company:

The averment of the bill is that the defendants are diverting and using the waters of the river for *agricultural* purposes. This defendant is a manufacturer of steel and iron products and not engaged in agriculture, and the bill is, as to it, misconceived.

Kansas claims under the riparian doctrine. The use of water by this defendant is within that doctrine. But this defendant does not by this claim waive its claim to the use of water for beneficial purposes under the laws of Colorado.

The Sugar Loaf reservoir of this defendant, at the head of the Arkansas

River, was established by the Government (13 L. D. 93), purchased by this defendant, and the use of water therein by it authorized, under act of Congress (29 Stats. 603), and this court cannot interfere. *Wisconsin* v. *Duluth,* 96 U. S. 387.

*77 * Kansas does not in this suit represent the majority of her citizens, but a small fraction only, and should be defeated on that ground. *New York* v. *Louisiana,* 108 U. S. 76.

The mountain ranges constitute an effectual barrier to the passage of moisture in the trade winds from the west, this moisture being condensed by the low temperature of these ranges is precipitated thereon as snow and rain, thus depriving the eastern portion of Colorado of its due share of direct precipitation. This eastern portion is now merely taking out by ditches for irrigation and utilizing its share of the precipitation as it melts and runs down, and which, but for this barrier, it would have received direct from the clouds.

The flow of the Arkansas River in the summer season never was constant. Before irrigation began in Colorado, and as early as 1806, and ever since, the river has been dry in the summer season for 200 miles in Colorado and Kansas.

The underflow, which Kansas claims is lessened to her injury, is not wholly dependent on the river, and has been materially lessened by absorption consequent on cultivation in Kansas and Colorado. Its continuance is not in any event a riparian right.

Prior to irrigation in Colorado, Kansas passed laws recognizing irrigation in Western Kansas, and many ditches were there taken out and water used for irrigation, and thus she has aided in producing the result she complains of. *Campbell* v. *Grimes,* 64 Pac. Rep. 62; *Koen* v. *Klein,* 65 Pac. Rep. 684.

Measured, therefore, in her own "half bushel" as this court says she must be, Kansas has no ground of complaint. *Missouri* v. *Illinois,* 200 U. S. 496.

Colorado (as well as every other arid State) is an independent nation in respect to the control and use of things which nature has supplied her within her own territory, in so far as such use is necessary to the development of her resources and the comfort of her people; among these are the waters of her streams.

*78 * Self-preservation is the highest right and duty of a Nation and a State. To this end either may use its internal resources for the benefit of its people, even if those of a friendly Nation or State may thereby be the sufferers. This right to the waters lies at the foundation of the existence of the arid States.

Aside from the question of navigation, which is not here involved, this right has never been, in terms or by implication, surrendered. By the Federal compact it was impliedly at least agreed that no State would wantonly injure a sister State, but it was not agreed that any State would deny to her own people that which is necessary for their prosperity and existence, simply because it might be of equal necessity to a sister State. *Texas* v. *White,* 7 Wall. 725; *Escanaba* v. *Chicago,* 107 U. S. 678; *In re Waters of the Rio Grande,* 21 Op. Atty. Gen. 274.

The power of the States to protect the lives, health and prosperity of their citizens, to govern men and things within the limits of their dominion, is a power originally and always belonging to the States, not surrendered by them to the General Government, nor restrained by the Federal Constitution, and is essentially exclusive. *United States* v. *Knight,* 156 U. S. 11.

Analogous to the sovereign right of a State to the water, is the right to the game and fish, which, like the water, are transitory in character, passing from State to State, being the property of that State in which they for the time being are. *Manchester* v. *Massachusetts,* 139 U. S. 240; *Geer* v. *Connecticut,* 161 U. S. 519; *Ward* v. *Racehorse,* 163 U. S. 504; *Manigault* v. *Springs,* 199 U. S. 473.

The contention for Federal control of waters of "interstate streams" is wholly untenable.

All streams in the arid States of the middle west, except a few which sink, are of necessity interstate, unless the fact that a stream bears the same name in two or more States, is the test. This cannot be the test of interstate character.

*79 Therefore the contention must include all the streams of * the middle west, and result in wiping out all state control whatever.

Congress fixes the policy of the Government. In ten or more acts relating to arid and desert lands, beginning with the year 1866, Congress has not only recognized the right of appropriation of water in the arid States for beneficial uses, but has also recognized the right of each State to control the same within its boundaries. The Reclamation Act of June 17, 1902 (32 Stats. 388), not only expressly recognizes state control of the water, but requires the Secretary of the Interior in carrying out the act to proceed under the state laws in respect to such control, and this has been done by the reclamation service in all cases.

The control of irrigation having thus been left to each of the several States by Congress, there has grown up in each State its own system of administration, and it would be impossible now to disturb these administrative regulations without causing endless confusion, even if Congress or this court had the right to do so.

The Reclamation Act can be successfully carried out only under state laws, whereby the rights of users thereunder can be fixed and protected.

The denial of state control would leave the appropriation and use of water without any administrative control whatever, and result in the serious impairment of the value of lands now dependent thereon and acquired under that doctrine as recognized for the last 40 years in the laws and customs of the arid States, while the affirmance of the riparian doctrine would return the arid west to its original desert condition, and result in incalculable injury to millions of people, and also put an end to the reclamation of public lands under the act in reference thereto.

Mr. Platt Rogers, with whom *Mr. John F. Shafroth* and *Mr. Frank E. Gregg* were on the brief, for the defendant. The Arkansas Valley Sugar Beet and Irrigated Land Company.

*80 * *Mr. C. C. Goodale* filed a separate brief on behalf of the defendant, the Graham Ditch Company.

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

While we said in overruling the demurrer that "this court, speaking broadly, has jurisdiction," we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporated rights are claimed by the respective litigants. Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many

respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

It is well, therefore, to consider the foundations of our jurisdiction over the controversies between States. It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of States. Whatever powers of government were granted to the Nation or reserved to the States (and for the description and limitation of those powers we must always accept the Constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.

The first resolution passed by the convention that framed the Constitution, sitting as a committee of the whole, was: "Resolved, That it is the opinion of this committee that a national government ought to be established, con-
*81 sisting of a * supreme legislative, judiciary, and executive." 1 Elliott's Debates, 151.

In *M'Culloch* v. *State of Maryland,* 4 Wheat. 316, 404, Chief Justice Marshall said:

"The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

See also *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 324, opinion by Mr. Justice Story.

In *Dred Scott* v. *Sandford,* 19 How. 393, 441, Chief Justice Taney observed:

"The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations."

And in Miller on the Constitution of the United States, p. 83, referring to the adoption of the Constitution, that learned jurist said: "It was then that a nation was born."

In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article I, Section 1. All legislative powers herein granted shall be vested in a Congress," etc.; and then in Article VIII mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.

*82 * In *M'Culloch* v. *State of Maryland, supra,* 405, Chief Justice Marshall said:

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its

enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the Nation. Section 2, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising. Construing this article in the early case of *Chisholm* v. *Georgia,* 2 Dall. 419, the court held that the judicial power of the Supreme Court extended to a suit brought against a State by a citizen of another State. In announcing his opinion in the case, Mr. Justice Wilson said (p. 453):

"This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one, no less radical than this—Do the people of the United States form a nation?"

In reference to this question attention may, however, properly be called to *Hans* v. *Louisiana,* 134 U. S. 1.

*83 * The decision in *Chisholm* v. *Georgia* led to the adoption of the Eleventh Amendment to the Constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or citizens or subjects of a foreign state. This Amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another. As said by Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 407: "The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States." See also *South Dakota* v. *North Carolina,* 192 U. S. 286.

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the Nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not without its consent subject to the controlling action of any of its instrumentalities or agencies. The creature cannot rule the creator. *Kawananakoa* v. *Polyblank, Trustee, &c.,* 205 U. S. 349. Nor is it inconsistent with the ruling in *Wisconsin* v. *Pelican*

Insurance Company, 127 U. S. 265, that an original action cannot be maintained in this court by one State to enforce its penal laws against a citizen of another State. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the State.

*84 These considerations lead to the propositions that when * a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power.

We may also notice a matter in respect thereto referred to at length in *Missouri* v. *Illinois & Chicago District,* 180 U. S. 208, 220. The ninth article of the Articles of Confederation provided that "the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States, concerning boundary, jurisdiction or any other cause whatever." In the early drafts of the Constitution provision was made giving to the Supreme Court "jurisdiction of controversies between two or more States, except such as shall regard territory or jurisdiction," and also that the Senate should have exclusive power to regulate the manner of deciding the disputes and controversies between the States respecting jurisdiction or territory. As finally adopted, the Constitution omits all provisions for the Senate taking cognizance of disputes between the States and leaves out the exception referred to in the jurisdiction granted to the Supreme Court. That carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the States which are justiciable in their nature. "All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do, settle the controversies between them." *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 743.

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. *United States* v. *Texas,* 143 U. S. 621; *S. C.,* 162 U. S. 1; *United State* v. *Michigan,* 190 U. S. 379.

*85 * The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized. *Kansas* v. *United States,* 204 U. S. 331, 341, and cases cited.

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas River into Kansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has

not that absolute right is the amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

The primary question is, of course, of national control. For, if the Nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two States in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several States," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or
*86 remove * obstructions in the natural waterways and preserve the navigability of those ways. In *United States* v. *Rio Grande Irrigation Company,* 174 U. S. 690, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703):

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action."

It follows from this that if in the present case the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the Government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it
*87 runs through Kansas and Colorado, * are large tracts of those lands; that the National Government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

In support of the main proposition it is stated in the brief of its counsel:

"That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent

the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the Government, in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or non-riparian, and that the priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right."

In other words, the determination of the rights of the two States *inter sese* in regard to the flow of waters in the Arkansas River is subordinate to a superior right on the part of the National Government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the General Government. As heretofore stated, the constant declaration of this court from the beginning is that this Government is one of enumerated powers. "The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Story, J., in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326. "The Government of the United States is one of delegated, limited, and enumerated powers." *United States* v. *Harris,* 106 U. S. 629, 635.

*88 Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, * it is enough to say that no one of them by any implication refers to the reclamation of arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice Marshall in these words: "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional"—a statement which has become the settled rule of construction. From this and other declarations is is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress.

We must look beyond section 8 for Congressional authority over arid lands and it is said to be found in the second paragraph of section 3 of Article IV, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging

*89 * to the Unitel States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the Government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made abso-

*90 lutely certain * by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we the people of the United States," not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the

United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction,
*91 but is to be considered fairly and * liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in *Fairbank* v. *United States,* 181 U. S. 283, 288:

"We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been en-
*92 larged, we have within our borders extensive tracts of arid lands * which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised.

It does not follow from this that the National Government is entirely powerless in respect to this matter. These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean

that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation. As said by Mr. Justice White, delivering the opinion of the court in *Gutierres* v. *Albuquerque Land Company,* 188 U. S. 545, 554, after referring to previous legislation:

"It may be observed that the purport of the previous acts is reflexively illustrated by the Act of June 17, 1902, 32 Stat. 388. That act appropriated the receipts from the sale and disposal of the public lands in certain States and
*93 Territories * to the construction of irrigation works for the reclamation of arid lands. The eighth section of the act is as follows:

" 'SEC. 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.' "

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters. *Martin* v. *Waddell,* 16 Pet. 367; *Pollard* v. *Hagan,* 3 How. 212; *Goodtitle* v. *Kibbe,* 9 How. 471; *Barney* v. *Keokuk,* 94 U. S. 324; *St. Louis* v. *Myers,* 113 U. S. 566; *Packer* v. *Bird,* 137 U. S. 661; *Hardin* v. *Jordan,* 140 U. S. 371; *Kaukauna Water Power Company* v. *Green Bay & Mississippi Canal Company,* 142 U. S. 254; *Shively* v. *Bowlby,* 152 U. S. 1; *Water Power Company* v. *Water Commissioners,* 168 U. S. 349; *Kean* v. *Calumet Canal Company,* 190 U. S. 452. In *Barney* v. *Keokuk, supra,* Mr. Justice Bradley said (p. 338):

"And since this court, in the case of *The Genesee Chief,* 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reasons for adhering to the old rule as to the
*94 proprietorship of the beds and shores of such * waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

In *Hardin* v. *Jordan, supra,* the same Justice, after stating that the title to the shore and lands under water is in the State, added (pp. 381, 382):

"Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. . . . Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. . . . This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many States expressly recognized as of controlling
*95 force in the absence of express statute. As said by Mr. * Justice Gray in *United States* v. *Wong Kim Ark,* 169 U. S. 649, 654:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett,* 21 Wall. 162; *Ex Parte Wilson,* 114 U. S. 417, 422; *Boyd* v. *United States,* 116 U. S. 616, 624, 625; *Smith* v. *Alabama,* 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com., 336; Bradley, J., in *Moore* v. *United States,* 91 U. S. 270, 274."

In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. See also the opinion of the Supreme Court of Kansas in *Clark* v. *Allaman,* 71 Kansas, 206. But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States, *Pollard* v. *Hagan, supra; Shively* v. *Bowlby, supra; Hardin* v. *Shedd,* 190 U. S. 508, 519; and Colorado by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation. Now the question arises between two States, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and

determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter
*96 for investigation and * determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several States. This contention was made in *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U. S. 92, in which it was asserted that, as Congress having sole jurisdiction over interstate commerce had prescribed no rates for interstate telegraph communications, there was no limit on the power of a telegraph company in respect thereto. After referring to the general contention, we said (pp. 101, 102):

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

What is the common law? Kent says (vol. 1, p. 471):

"The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those state-
*97 ments are found in the decisions * of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In *The Paquete Habana*, 175 U. S. 677, 700, Mr. Justice Gray declared:

"International law is part of our law, and must be ascertained and adminis-

tered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

And in delivering the opinion of the demurrer in this case Chief Justice Fuller said (185 U. S. 146):

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand."

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois,* 180 U. S. 208, the action of one State reaches through the agency of natural laws into
*98 the territory of another State, * the question of the extent and limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these two ways being practicable, it must be settled by decision of this court.

It will be perceived that Kansas asserts a pecuniary interest as the owner of certain tracts along the banks of the Arkansas and as the owner of the bed of the stream. We need not stop to consider what rights such private ownership of property might give.

*99 * In deciding this case on demurrer we said (185 U. S. 142), referring to the opinion in *Missouri* v. *Illinois.*

"As will be perceived, the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriæ,* trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens

of the other in jeopardy, presented a cause of action justiciable under the Constitution.

"In the case before us, the State of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action and not the action of state officers in abuse or excess of their powers."

It is the State of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. *Georgia* v. *Tennessee Copper Co.*, decided this day, *post*, p. 230.

This changes in some respect the scope of our inquiry. It is not limited
*100 to the simple matter of whether any portion of the * waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective States and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.

We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two States, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way
*101 can be * made valuable as arable lands producing an abundance of vegetable

growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed. Science may not as yet be able to give positive information as to the processes by which the distribution of water over certain territory has operation beyond the mere limits of the area in which the water is distributed, but they who have dwelt in the West know that there are constant changes in the productiveness of different portions of the territory, owing, apparently, to a wider and more constant distribution of water. To illustrate, the early settlers of Kansas territory found that farming was unsuccessful unless confined to its eastern 100 or 120 miles. West of that crops were almost always a failure, but now that region is the home of a large population, with crops as certain as those elsewhere, and yet this change has not been brought about by irrigation. A common belief is that the original sod was largely impervious to water, that when the spring rains came the water, instead of sinking into the ground, filled the watercourses to overflowing and ran off to the Gulf of Mexico. There was no water in the soil to go up in vapor and come down in showers, and the constant heat of summer destroyed the crops; but after the sod had once been turned the water from those rains largely sank into the ground, and then as the summer came on went up in vapor and came down in showers, and so by continued watering prevented the burning up of the growing crops. We do not mean to say that science has demonstrated this to be the operating cause or that other theories are not propounded,

but the fact is that, instead of stopping at a distance of 120 miles from the
*102 Missouri River, the area of cultivated and * profitably cultivated land has extended 150 to 200 miles further west, and seems to be steadily moving towards the western boundary of the State. Now if there is this change gradually moving westward from the Missouri River, is it altogether an unreasonable expectation that as the arid lands of Colorado are irrigated and become from year to year covered with vegetation, there will move eastward from Colorado an extension of the area of arable lands until, between the Missouri River and the mountains of Colorado, there shall be no land which is not as fully subject to cultivation as lands elsewhere in the country? Will not the productiveness of Kansas as a whole, its capacity to support an increasing population, be increased by the use of the water in Colorado for irrigation? May we not consider some appropriation by Colorado of the waters of the Arkansas to the irrigation and reclamation of its arid lands as a reasonable exercise of its sovereignty and as not unreasonably trespassing upon any rights of Kansas? And here we must notice the local law of Kansas as declared by its Supreme Court, premising that the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two States are as here disclosed. In *Clark* v. *Allaman,* 71 Kansas, 206, is an exhaustive discussion of the question, Mr. Justice Burch delivering the unanimous opinion of the court. In the syllabus, which by statute (Compiled Laws, Kansas, p. 317, sec. 14) is prepared by the justice writing the opinion, and states the law of the case, are these paragraphs:

"The use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements have been subserved, is one of the common law rights of a riparian proprietor.

"The use of water by a riparian proprietor for irrigation purposes must be reasonable under all the circumstances, and the right must be exercised with due regard to the equal right of every other riparian owner along the course of the stream.

*103 "A diminution of the flow of water over riparian land caused * by its use for irrigation purposes by upper riparian proprietors occasions no injury for which damages may be allowed unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the landowner is able to enjoy.

"In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land."

And in the opinion, on pages 242, 243, are quoted these observations of Chief Justice Shaw in the case of *Elliott* v. *Fitchburg Railroad Company,* 10 Cush. 191, 193, 196:

"The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris,* of such a character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use, may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes, would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is, therefore, to a considerable extent a question of degree; still, the rule is the same, that
*104 each proprietor has a right to a reasonable use of it, for * his own benefit, for domestic use, and for manufacturing and agricultural purposes. . . .

"That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. . . .

"This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in

its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so, each is bound so to use his common right, as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right, by all the proprietors. . . .

"The right to the use of flowing water is *publici juris,* and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie."

As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is ad-
*105 ministered * between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation. The Arkansas River, from its source to the eastern end of the Royal Gorge, is a mountain torrent coming down between rocky banks and over a rocky bed. Along this distance it is of comparatively little use for irrigation purposes. After it debouches from the Royal Gorge it enters a valley, in which it wanders from one side to the other through eastern Colorado, southwestern Kansas and into Oklahoma, with but a slight descent, and presenting but little opportunities for the development of water power through falls or by dams. Its length in Kansas is about three hundred and fifty miles, and the descent is only 2,320 feet, or less than seven feet to a mile. There are substantially no falls, no narrow passageways in which dams can be readily constructed for the development of water power; and while there are some in eastern Colorado, yet they are of little elevation and mainly to assist in the storing of water for purposes of irrigation. So that, if the extreme rule of the common law were enforced, Oklahoma having the same right to insist that there should be no diversion of the stream in Kansas for the purposes of irrigation that Kansas has in respect to Colorado, the result would be that the waters, except for the meagre amount required for domestic purposes, would flow through eastern Colorado and Kansas and be of comparatively little advantage to either State, and both would lose the great benefit which comes from the use of the water for irrigation. The drainage area of the Arkansas River in Colorado is 26,000 square miles; in Kansas, 20,000 square miles; and all this area, unless the stream can be used for purposes of irrigation, would be left to the slow development which comes from the cultivation of the soil.

The testimony in this case is voluminous, amounting to 8,559 typewritten pages, with 122 exhibits, and it would be impossible to make a full statement of facts without an extravagant extension of this opinon, which is already too long,
*106 * and yet some facts must be stated to indicate the basis for the conclusion to which we have come. It must also be noted that, as might be expected in such a volume of testimony, coming as it does from three hundred and forty-seven witnesses, there is no little contradiction and a good deal of confusion, and this contradiction is to be found not merely in the testimony of witnesses, but also

in the exhibits, among which are reports from the officials of the Government and the two States. We have endeavored to deduce from this volume those matters which seem most clearly proved, and must, as to other matters, be content to generalize and state that which seems to be the tendency of the evidence.

Colorado is divided into five irrigating divisions, each of which is in charge of a division engineer. That which includes the drainage area of the Arkansas is District No. 2, divided into eleven districts. Under the laws of Colorado, irrigating ditches have been established in this district and the amount of water which each may take from the river decreed. In addition some reservoirs have been built for storing the surplus waters which come down in times of flood, and this adds largely to the amount available for irrigation. The storage capacity of six of these reservoirs is shown to be 8,527,673,652 cubic feet. The significance and value of these reservoirs can be appreciated when we remember that the Arkansas, like many other streams, has its origin in the mountain districts of Colorado, and that by the melting of the snows almost every year there is a flood. The amount of water authorized to be taken by the ditches from the river is, as alleged in the bill, 4,200 cubic feet, and from its affluents and tributaries 4,300 feet. (Whenever this term is used in reference to the flow of water it means the number of cubic feet that pass in a second.) The average flow of the river, as it comes out of the Royal Gorge at Cañon City, is as shown by official measurements for a series of years, 750 cubic feet. So that it appears that the irrigating ditches are authorized to take from the Arkansas River much more water than passes in the chan-
*107 nel into the valley. It is not clear * what surplus water, if any, comes out of the tributaries. There are some twenty-five of them, the average flow from four of which into the Arkansas is 313 cubic feet. Aside from this surplus water some may be returned through overflow of the ditches or from seepage. What either of these amounts may be is not disclosed. Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something proof of which must necessarily be almost impossible. We may note the fact that a tract, bordering upon land which has been flooded, shows by its increasing vegetation that it has received in some way the benefit of water, and yet the amount of the water passing by seepage may never be definitely known. The underground movement of water will always be a problem of uncertainty. We know that when water is turned upon dry and barren soil the barrenness disappears, vegetation is developed, and that which was a desert becomes a garden. It is the magic of transformation; the wilderness budding and blossoming as the rose. The writer of this opinion recalls a conversation with Bayard Taylor, the celebrated traveler, in which the latter stated that nothing had contributed so much to secure the steady control of the French in Algiers as the fact that after taking possession of that territory they sank artesian wells on the borders of the desert, and thus reclaimed portions of it, for the Arabs believed that people who could reclaim the desert were possessed of a power that could not be withstood.

Further, adjacent barren ground is slowly but surely affected, and itself begins to increase its vegetation. We may not be entirely sure as to the methods by which this change is accomplished, although the result is undoubted. It may be that water percolating under the surface has reached this adjacent ground. Per-

haps the vegetation, which we know attracts moisture from the air, may increase the rainfall, and thus affect the adjacent barren regions.

*108 It appears that prior to 1885 there was comparatively little * water taken from the Arkansas for irrigation purposes—certainly not enough to make any perceptible impression on the flow of the river—but about that time certain corporations commenced the work of irrigation on a large scale, with ditches, some of which might well be called canals. Thus, in 1884, work was commenced on ditches capable of carrying off 450 cubic feet; in 1887 others capable of carrying off 1,481 cubic feet, and in 1890 still others carrying 1,705 cubic feet. Most of these were completed within two years after the commencement of the several works. By the year 1902, according to the report of the Census Bureau of the United States, there were 300,115 acres, in 4,557 farms, actually irrigated.

The counties in Colorado, from Cañon City eastward, through which the Arkansas runs are Fremont, Pueblo, Otero, Bent and Prowers. The following tables prepared by the defendants from various census reports show the population, number of acres cultivated and total value of farm products in these several counties for the years 1880, 1890 and 1900:

County.	Population.		
	1880.	1890.	1900.
Fremont	4,735	9,156	15,636
Pueblo	7,617	31,491	34,448
Otero	.....	4,192	11,522
Bent	1,654	1,313	3,049
Prowers	.....	1,969	3,766
Making in the aggregate	14,006	48,121	68,421

*109 * County.	No. of acres cultivated.			Value of Farm Products.		
	1880.	1890.	1900.	1880.	1890.	1900.
Fremont	16,160	52,868	109,488	$76,900	$237,980	$472,293
Pueblo	51,984	100,697	478,821	136,184	244,580	691,693
Otero	.....	61,347	244,594	.....	208,860	1,089,344
Bent	30,921	30,058	118,485	105,621	35,070	670,541
Prowers	.....	46,447	217,332	.....	60,500	465,688
	98,975	291,417	1,168,720	$318,705	$786,990	$3,389,559

These tables disclose a very marked development in the population, area of land cultivated and amount of agricultural products. Whatever has been effective in bringing about this development is certainly entitled to recognition, and should not be wantonly or unnecessarily destroyed or interfered with. That this development is largely owing to irrigation is something of which from a consideration of the testimony there can be no reasonable doubt. It has been a prime factor in securing this result, and before, at the instance of a sister State, this effective cause of Colorado's development is destroyed or materially interfered

with, it should be clear that such sister State has not merely some technical right, but also a right with a corresponding benefit.

It may be asked why cultivation in Colorado without irrigation may not have the same effect that has attended the cultivation in Kansas west of where it was productive when the territory was first settled. It may possibly have such effect to some degree, but it must be remembered that the land in Colorado is many hundred feet in elevation above that in Kansas; that large portions of it are absolutely destitute of sod, and that cultivation would have comparatively little effect upon the retention of water. Add further the fact that the rainfall in Colorado is less than that in Kansas, and it would seem almost certain that reliance upon mere cultivation of the soil would not have anything like the effect in
*110 Colorado * that it has had in Kansas, and that the barrenness which characterized portions of the territory of Colorado would have continued for an indefinite time unless relieved by irrigation.

Turning to Kansas, the counties along the Arkansas River, commencing from the Colorado line are: Hamilton, Kearney, Finney, Gray, Ford, Edwards, Pawnee, Barton, Rice, Reno, Sedgwick, Sumner, Cowley. Taking the same years as are given for the Colorado counties, the population is shown to be:

County.	Population.		
	1880.	1890.	1900.
Hamilton	168	2,027	1,426
Kearney	159	1,571	1,107
Finney	.....	3,350	3,469
Gray	.....	2,415	1,264
Ford	3,122	5,308	5,497
Edwards	2,409	3,600	3,682
Pawnee	5,396	5,204	5,084
Barton	10,318	13,172	13,784
Rice	9,292	14,451	14,745
Reno	12,826	27,079	29,027
Sedgwick	18,753	43,626	44,037
Sumner	20,812	30,271	25,631
Cowley	21,538	34,478	30,156
	104,793	186,552	178,909

We have been furnished by the United States Census Office with statistics of the corn and wheat crops of those counties from the years 1889 to 1904. Corn, wheat and hay are the leading crops in Kansas. It would unnecessarily prolong this opinion to copy these tables in full, so we give the figures for 1890, 1895, 1900 and 1904:

*111 * *Acreage and Production of Corn and Wheat in Kansas—13 Counties*

YEAR.	COUNTY.	CORN.		WHEAT.	
		ACRES.	BUSHELS.	ACRES.	BUSHELS.
1890.	Hamilton	80	400	449	6,636
	Kearney	872	8,720	586	10,658
	Finney	2,423	48,460	1,410	24,740
	Gray	493	2,465	3,335	38,724
	Ford	1,558	12,464	7,190	107,295
	Edwards	2,058	20,580	8,876	168,094
	Pawnee	544	2,720	39,464	591,402
	Barton	3,666	25,662	99,738	1,294,639
	Rice	27,460	329,520	52,941	792,345
	Reno	98,972	989,720	35,121	351,210
	Sedgwick	67,685	744,535	52,506	944,804
	Sumner	19,120	267,680	134,352	2,149,116
	Cowley	63,391	887,474	28,073	282,666
	Totals	288,322	3,340,400	464,041	6,762,329
1895.	Hamilton	404	3,232	4,360	12,576
	Kearney	914	5,698	2,917	6,430
	Finney	2,058	20,580	27,428	69,801
	Gray	1,115	11,150	12,297	12,309
	Ford	12,145	194,320	36,626	109,914
	Edwards	21,222	212,220	47,479	94,958
	Pawnee	19,076	152,608	113,980	342,075
	Barton	103,831	778,732	179,761	359,284
	Rice	153,256	3,371,632	127,200	254,394
	Reno	205,745	7,406,820	89,973	314,573
	Sedgwick	190,646	5,147,442	93,351	279,711
	Sumner	181,642	2,179,704	248,115	619,884
	Cowley	133,745	2,674,900	89,866	673,822
	Totals	1,025,799	22,159,038	1,073,353	3,149,731
1900.	Hamilton	266	3,990	155	1,550
	Kearney	538	11,298	506	5,492
	Finney	1,213	18,195	427	4,234
	Gray	2,001	30,015	4,023	59,605
	Ford	11,215	145,795	23,416	444,904
	Edwards	25,032	325,416	43,525	696,400
	Pawnee	16,257	146,313	115,931	1,969,801
	Barton	32,649	261,192	254,130	5,081,352
	Rice	71,151	355,755	148,597	3,120,537
	Reno	199,150	1,991,500	110,404	2,097,276
	Sedgwick	153,635	2,766,430	123,339	2,589,811
	Sumner	102,057	2,143,197	288,133	5,761,260
	Cowley	121,398	2,792,154	79,948	1,439,064
	Totals	736,562	10,991,250	1,192,534	23,271,286
*112 1904.	Hamilton	120	1,800	271	2,297
	Kearney	306	6,120	536	6,244
	Finney	759	7,590	7,012	37,382
	Gray	1,579	25,264	17,268	69,590
	Ford	10,631	170,096	72,917	365,299
	Edwards	23,396	584,900	130,313	1,302,834
	Pawnee	13,272	331,800	162,970	1,629,246
	Barton	26,984	728,568	262,673	3,414,731
	Rice	59,851	1,556,126	160,853	2,251,838
	Reno	138,899	4,028,071	207,002	3,518,752
	Sedgwick	132,374	3,441,724	151,635	1,971,255
	Sumner	79,808	1,995,200	294,489	3,828,192
	Cowley	109,708	2,962,116	68,477	821,652
	Totals	597,687	15,839,375	1,536,416	19,219,312

Comparing the tables of population it will be perceived that both the counties in Colorado and Kansas made a considerable increase in the years from 1880 to 1890; that while the Colorado counties continued their increase from 1890 to 1900, the Kansas counties lost. As the withdrawal of water in Colorado for irrigating purposes became substantially effective about the year 1890, it might, if nothing else appeared, not unreasonably be concluded that the diminished flow of the river in Kansas, caused by the action of Colorado, had resulted in making the land more unproductive, and hence induced settlers to leave the State. As against this it should be noted, as a matter of history, that in the years preceding 1890, Kansas passed through a period of depression, with crops largely a failure in different parts of the State. But, more than that, in 1889 Oklahoma, lying directly south of Kansas, was opened for settlement and immediately there was a large immigration into that territory, coming from all parts of the West, and especially from the State of Kansas, induced by glowing reports of its great possi-
*113 bilities. The population of Oklahoma, * as shown by the United States census, was, in 1890, 61,834, and in 1900, 348,331.

Turning to the tables of the corn and wheat products, they do not disclose any marked injury which can be attributed to a diminution of the flow of the river. While there is a variance in the amount produced in the different counties from year to year, it is a variance no more than that which will be found in other parts of the Union, and although the population from 1890 to 1900 in fact diminished, the amount of both the corn and wheat product largely increased. Not only was the total product increased, but the productiveness per acre seems to have been materially improved. Take the corn crop, and per acre, it was, in 1890, 12 bushels and a fraction; in 1895, 21 and a fraction, in 1900, 15, and in 1904, 28 bushels. Of wheat, the product per acre in 1890 was nearly 15 bushels; in 1895 it was only about 3 bushels. (For some reason, while that was a good year for corn, it seems to have been a bad year for wheat.) But in 1900 the product per acre rose to 19 bushels, and in 1904 it was 12 bushels.

These are official figures taken from the United States census reports, and they tend strongly to show that the withdrawal of the water in Colorado for purposes of irrigation has not proved a source of serious detriment to the Kansas counties along the Arkansas River. It is not strange that the western counties show the least development, for being nearest the irrigation in Colorado, they would be most affected thereby. At one time there were some irrigating ditches in these western counties, which promised to be valuable in supplying water and thus increasing the productiveness of the lands in the vicinity of the stream, and it is true that those ditches have ceased to be of much value, the flow in them having largely diminished.

It cannot be denied in view of all the testimony (for that which we have quoted is but a sample of much more bearing upon the question), that the diminution of the flow of water in the river by the irrigation of Colorado has
*114 worked some * detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

Many other matters have been presented and discussed. We have examined

and fully considered them, but, as heretofore stated, we shall have to content ourselves with merely general observations respecting them. Evidence has been offered of an alleged underflow of the river as it passes through the State of Kansas, and it seems to be the contention on the part of Kansas that beneath the surface there is, as it were, a second river with the same course as that on the surface, but with a distinct and continuous flow as of a separate stream. We are of the opinion that the testimony does not warrant the finding of such second and subterranean stream. If the bed of a stream is not solid rock, but earth through which water will percolate, and, as alleged in plaintiff's bill, the "valley of the river in the State of Kansas is composed of sand covered with alluvial soil," undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells or other modes of exploring the subsurface. Undoubtedly, too, in many places there may be corresponding to the flow on the surface a current beneath the surface, but the presence of such subsurface water, even though in places of considerable amount and running in the same direction, is something very different from an independent subsurface river flowing continuously from the Colorado line through the State of Kansas. It is not properly denominated a second and subsurface stream. It is rather to be regarded as merely the accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. Naturally, the more abundant the flow of the surface stream and the wider its channel the more of this subsurface
*115 water there will be. If * the entire volume of water passing down the surface was taken away the subsurface water would gradually disappear, and in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water, it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the further it will reach in its percolations on either side as well as more distinct will be its movement down the course of the stream. The testimony, therefore, given in reference to this subsurface water, its amount and its flow bears only upon the question of the diminution of the flow from Colorado into Kansas caused by the appropriation in the former State of the waters for the purposes of irrigation.

Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and from springs and branches starting a new stream to flow onward through Kansas and Oklahoma towards the Gulf of Mexico. From time immemorial the existence of a single continuous river has been recognized by geographers, explorers and travelers. That there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows. Thus, from one of complainant's exhibits furnished by the United States Geological Survey, the mean monthly flow at Cañon City at the mouth of the Royal Gorge for the years 1890, 1895 and 1900 is as follows:

*116 **Arkansas River—Cañon City. Mean Monthly Discharge in Second Feet.*

	1890.	1895.	1900.
January	310	344	*a* 345
February	363	361	*a* 353
March	320	471	*a* 439
April	477	868	736
May	2,090	1,506	2,251
June	2,611	1,900	3,492
July	1,571	1,413	891
August	670	1,095	273
September	519	635	211
October	531	505	241
November	522	499	266
December	502	444	298

a Approximate.

Doubtless the variance at different seasons of the year is more regular and more pronounced than in those streams whose sources are only slightly elevated and the rise and fall of whose waters is mainly owing to rains. Contrasting, for instance, the Hudson with the Missouri, illustrates this. When the June flood comes down the Missouri River it is a mighty torrent. One can stand on the bluffs at Kansas City and see an enormous volume of water, extending in width from two to five miles to the bluffs on the other side of the river, flowing onward with tremendous velocity and force, and yet at other times the entire flow of the Missouri River passes between two piers of the railroad bridge across the river at that point. No such difference between high and low water appears in the Hudson. In the days when navigation west of the Mississippi was largely by steamboats on the Missouri River, it was familiar experience for the flat-bottomed steamboats, drawing but little water, to be aground on sandbars and detained for hours in efforts to cross them. Gen. Doniphan commanded an expedition which marched from Fort Leavenworth in 1846 up the Arkansas Valley and into the Territory of New Mexico. He did not enter the valley again until shortly before his death in 1887, and when asked what he recognized replied that there
*117 * were one or two natural objects like Pawnee rock that appeared as they did when he marched up the valley; the river was the same but all else was changed, and the valley instead of being destitute of human occupation was filled with farm houses and farms, villages and cities—something that he had never expected would be seen in his day.

Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we

are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes.

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the
*118 plaintiff to institute new proceedings when * ever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river. Each party will pay its own costs.

In closing, we may say that the parties to this litigation have approached the investigation of the questions in the most honorable spirit, seeking to present fully the facts as they could be ascertained from witnesses and discussing the evidence and questions of law with marked research and ability.

Mr. Justice White and Mr. Justice McKenna concur in the result.

Mr. Justice Moody took no part in the decision of this case.

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1907.

[206 *United States*, 290.]

This court has original jurisdiction of a suit by the State of Virginia against the State of West Virginia for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts to adjudicate and determine the amount, if any, due the former by the latter.

Consent to be sued in this court by another State is given by a State, by, and at the time of, its admission into the Union. It will be presumed that the legislature of a State will provide for the satisfaction of any judgment that may be rendered against it, and the jurisdiction and power of this court is not affected by the question of how it will be enforced. If a State should repudiate its obligation to satisfy judgment rendered against it, this court will after the event consider the means by which it may be enforced.

The Court having jurisdiction of the controversy, the effect of the provisions in the
*291 constitution of West Virginia, as well as the several statutes enacted * by that State and by Virginia on the liability of West Virginia, for a part of the public debt of Virginia, and the relations of Virginia to the holders of bonds will not be determined on demurrer, but postponed to the merits.

THIS is a bill filed, on leave, February 26, 1906, by the Commonwealth of Virginia against the State of West Virginia.

The bill averred that—

"On the first day of January, 1861, complainant was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose; but a portion of her liabilities though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

"In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the State, as created under her laws amounting, the former to $1,462,993.00, and the latter to $1,543,669.05 as of the same date.

"The official reports and records showing the exact character and amounts of the public debt thus contracted and how the same was created, are referred to, and will be produced upon a hearing of the case.

"(2) That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture, and to some extent to grazing and manufacturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the
*292 country, were understood to be well * nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio River, that the Commonwealth of Virginia, in the first quarter of the Nineteenth Century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed East of the Appalachian range, as leading up to the undeveloped territory West thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed West of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio River, since the first day of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines East of said range been first constructed; and your oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1, 1861, and to the

formation of the Sinking Fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedness to be contracted was a small amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

*293 * "(3) The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvement, in a very large measure for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropriations. Indeed it appears from those records that a great majority of the acts of the legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been a fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

"(4.) The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of

*294 such improvements had, prior to that time, been * constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local purposes. As early as the year 1816 a Board of Public Works was created by law for the State, the members of which were elected by the voters of the State at large, and this Board had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this Board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by a[n] examination of the numerous entries in the records of this Board extending through a number of years and showing such expenditures as made from time to time.

"(5.) On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was intended to withdraw Vir-

ginia from the union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the 'Restored State of Virginia,' and will be hereafter referred to in this bill as the 'Restored State.'

"(6.) On the 20th day of August, 1861, the 'Restored State of Virginia,' in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to 'provide for the formation of a new State out of the portion of the territory of this State;' section 9 of which ordinance was as follows, to-wit:

"'9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted, and deducting therefrom the moneys paid
*295 into the Treasury of the * Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.'

"(7.) On the 31st day of December, 1862, an act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein; and it was provided by this act of Congress that whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operation on the date last named.

"(8.) Pending the admission of the State of West Virginia into the Union the General Assembly of the 'Restored State of Virginia' passed February 3, 1863, the following act:

"'That all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any
*296 * other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this State, or in the president and directors of the Literary Fund, or the Board of Public Works thereof, or in any person or persons

for the use of this State, to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said Board of Public Works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said Board of Public Works, or of any person or persons, for the use of this State.

" 'That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government.' "

Complainant charged "that the property which was by the operation of this act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted, in the aggregate, to several millions of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury from the sale thereof about six hundred thousand dollars; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861.

*297 * "(9.) And by a further act of the General Assembly of the 'Restored State of Virginia' passed on the next day, February 4th, 1863, it was enacted:

" '1. That the sum of one hundred and fifty thousand dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

" '2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State.'

"And this last named sum of one hundred and fifty thousand dollars together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

"(10.) The constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union, contained the following provisions:

"By Section 5 of Article VIII, of said constitution it was provided:

"'5. No debt shall be contracted by this State except to meet casual
*298 deficits in the revenue, to redeem a previous * liability *to* [of] the State, to suppress insurrection, repel invasion or defend the State in time of war.'

"And by Section 7 of Article VIII it was provided:

"'7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.'

"And by Section 8 of Article VIII it was provided:

"'8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.'

"At the time the constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any 'public debt' or 'previous liability,' except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the acts of the General Assembly of the 'Restored State of Virginia' above set forth. By the provisions of section 8 of Article VIII, above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By section 5 of the same Article VIII, above set forth, her constitution forbade the creation of any debt 'except to meet casual deficits in the revenue, to redeem a previous liability of the State,' &c., and there was not and could not have been any such 'previous liability,' except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the acts of the General
Assembly of the 'Restored State.' And section 7 of the same article of her
*299 constitution, above cited, * authorized a sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks, except those acquired, as above stated, from the original state. This section of her constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

"(11.) After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settlement of any kind was ever had between the two States in regard to this debt.

"(12.) The efforts looking to a settlement by the concurrent action of the two States having proved abortive, and your oratrix being anxious to adjust the portion of the common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

"The first of these was made by the General Assembly which was chosen at the close of the period of 'destruction and reconstruction,' which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

"The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay to the utmost every dollar which her most exacting creditor could demand of her, was expressed in the act of her General Assembly, approved March 30, 1871.

*300 * "By the terms of settlement embodied in this act, your oratrix undertook to give her obligations bearing 6% interest for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest, which accrued interest to the extent of nearly $8,000,000, had been funded after the war in new bonds of Virginia, thus capitalizing at 6% not only the interest, but interest upon that interest.

"It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the state debt were attempted by the acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the act of February 20, 1892. Your oratrix will file copies of each of the acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

"(13.) As further indicating the great burden which your oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your honors that, since January 1st, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over seventy-one million dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as 'Exhibit Number 7.'

"It is proper in this connection to call attention to the fact that, while your oratrix has made this large contribution toward the settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted au-

*301 thorities have for a number * of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your oratrix in reference thereto.

"It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several acts above recited.

"A question may be raised as to whether such was the effect of the language used in the act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of

this court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the act of March 30, 1871, which it was the purpose of your oratrix that it should have.

"(14.) By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her.

"Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit
*302 and fair name required that these obligations * of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

"Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your oratrix and to all of her people.

"(15.) All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph 1 of this bill, except a comparatively insignificant sum, not amounting to one per cent. of the aggregate of those liabilities, have been taken up and are now actually held by your oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto. They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your oratrix, will, when it shall be proper to do so, be exhibited to the master, who shall take the accounts hereinafter prayed for.

"(16.) Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of $25,000,000, by far the greater part of it being now, of course, on account of the interest computed thereon, at the rate of 6% per annum, the then legal rate in both States.

*303 * "For all of these obligations taken up and payments made on account of the common debt, your oratrix has in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

"(17.) In addition to the above bonds there were outstanding on the first day of January, 1861, certain obligations of the State of Virginia as guarantor upon

some of the securities issued by internal improvement companies, which your oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereinafter prayed for to be taken between the two States; and in such accounts your oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend throughout a period of so many years' duration that it is imposssible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your oratrix thereon ascertained, under the supervision of a court of equity.

"(18.) Your oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

"First. The area of the territory now known as the State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with
*304 the population thereof, assume * therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

"Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

"Third. The State of West Virginia has further, by the repeated enactments and joint resolution of her legislature, recognized her liability for a just proportion of this debt.

"Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon express condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

"Fifth. While the transfer of this property, real and personal, and also of certain moneys of the Commonwealth of Virginia, purport to have been made to the State of West Virginia by the act of 'The Restored Government of Virginia,' there were in fact represented in said 'Restored Government' and in the legislature thereof no other people and no other territory than that which then, as now, constitute the State of West Virginia.

"(19.) The General Assembly of Virginia being anxious to effect a settle-

ment of the portion of the common debt of the undivided State which remained unadjusted, and if possible to bring this about with the friendly coöpera-
*305 tion and concurrence * of West Virginia, adopted; 'A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of West Virginia to the payment of those found to be entitled to the same,' approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

"Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

"The efforts made by this commission, acting under the above resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the commission, with the active coöperation of the Honorable Charles T. O'Ferral, the then Governor of the Commonwealth, made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the act approved March 6, 1900, entitled 'An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises,' the purpose of which act is sufficiently set forth in its title, and a copy of the act will also be hereinafter shown as one of the exhibits herewith filed.

"(20.) The commission acting under said last mentioned act made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this honorable court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said commission, and in strict conformity with the provisions of the said act of March 6, 1900, all of which will be more fully and
*306 completely * shown by the report of the said commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this bill."

"(21.)" Enumerates exhibits attached to the bill and prayed to be regarded as part thereof.

"(22.)" The bill prayed: "Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same; that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of

such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet."

*307 * Attached to the bill were the numerous exhibits referred to.

The State of West Virginia demurred and assigned special causes as follows:

"First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

"Second. That this court has no jurisdiction of either the parties to or the subject matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

"Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

"Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

"Fifth. That it does not appear by said bill that the Attorney General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and

*308 benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

"Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

"Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

"Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

Hearing on the demurrer was had March 11, 12, 1907.

Mr. William A. Anderson, Attorney General of the State of Virginia, and *Mr. Holmes Conrad,* for complainant:

The definitions of misjoinder under English chancery practice, as well as the practice in this country, show that there is no such vice in the bill, while want of interest by a co-plaintiff in the subject matter is ground of demurrer. Story's Eq. Pl., §§ 231, 232, 508, 509; Mitf. Pl. 160, 161. Plaintiffs who have no common interest, but assert distinct and several claims against one and the same defendant, cannot be joined. Story's Eq. Pl. § 279. On the other hand, where there is a community of interests among co-plaintiffs desiring the same relief against a common defendant, they may be joined. *Ware* v. *Duke of Northumberland,* 2 Anstruther's Rep. 469; *Brickenhoff* v. *Browns,* 6 Johns. Ch. 139, 151, 152.

It is impossible that there can be any misjoinder of parties plaintiff, because there is only one party plaintiff. Virginia, in her corporate capacity, is the only plaintiff in the suit. She does not sue in any representative capacity, though the bill discloses the fact that, by reason of the arrangements which she has
*309 made with the great mass of the holders of the * bonds of the old State, she does hold in her possession nearly all of those bonds as a depository, and *quoad* the custody thereof that she holds them in a fiduciary capacity; but she does not sue as trustee, but sues in her own name, for the purpose of obtaining the equitable relief to which the bill shows that she is fairly entitled.

One interest is that she shall be exonerated, at least to the extent of West Virginia's liability therefor, from any obligation to pay the bonds.

To obtain such just exoneration she has invoked the equitable jurisdiction of this court.

West Virginia is justly liable on many grounds for a just proportion of the public debt of her parent State, Virginia; West Virginia has not only repudiated and openly disavowed such liability, but she has appropriated to her own use a large amount in value of the public property of Virginia, which Virginia might properly have applied as part of her public assets, to the payment of her public debt; and now, when by this bill in equity Virginia calls on West Virginia to account for the property which she has appropriated and applied to her own uses, and to come in before this court and have her proportion of the public debt ascertained, West Virginia, by her demurrer, protests that the part of the public debt which she owes and the part of the public assets which she has appropriated to her own use are two subjects of complaint so distinct and unconnected as should relieve her from making answer to the bill. This case is entirely different from *New York* v. *Louisiana* and *New Hampshire* v. *Louisiana,* 108 U. S. 78, where neither State had any direct or personal interest in the bonds of Louisiana or in the subject matters of controversy in those suits, but were mere volunteers, self-constituted trustees, without sustaining any relation, or interest, or obligation, or liability in regard to the bonds, or to any question presented in those causes.

While it may be true that, as to the custody of some of these unsatis-
*310 fied bonds, Virginia sustains the relation of * trustee, she has an enormous interest as to those bonds—an interest as substantial and as real, if not in fact as great, as if she had actually paid these bonds in full.

The ground of demurrer that this court has no jurisdiction of either the parties to or the subject matter of this action, because the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy as can be heard and determined in this court, and this

court has no power to render or enforce any final judgment or decree thereon, is untenable. *Chisholm* v. *Georgia,* 2 Dall. 419; *Hans* v. *Louisiana,* 134 U. S. 1; *Cohens* v. *Virginia,* 6 Wheat. 364, 375, 440; *Kansas* v. *Colorado,* 185 U. S. 125; *Missouri* v. *Illinois,* 180 U. S. 240.

This question has been directly passed upon by this court and its jurisdiction over controversies arising upon pecuniary demands has been sustained in *Georgia* v. *Brailsford,* 2 Dall. 402; *Texas* v. *White,* 7 Wall. 700; *Florida* v. *Anderson,* 91 U. S. 667; *Alabama* v. *Burr et al.,* 115 U. S. 413; and even more emphatically and conclusively in *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *Texas,* 143 U. S. 621; and *United States* v. *Michigan,* 190 U. S. 379, 396, 406.

Mr. John G. Carlisle and *Mr. Charles E. Hogg,* with whom *Mr. C. W. May,* Attorney General of the State of West Virginia, *Mr. W. Mollohan, Mr. George W. McClintic* and *Mr. W. G. Mathews* were on the brief, for defendant:

To create a controversy between two States, it seems to us that there must be an assertion of a substantial right of one State as such which is denied or repudiated by the other, and which relates to the interests of each as States, and that the determination of the issue thus raised will promote or secure some substantial right of the one or the other of these States as States. *New Jersey* v. *New York,* 5 Pet. 285; *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *Florida* v. *Georgia,* 11 How. 293; *Virginia* v. *West Virginia,* 11 Wall. 39, were cases in equity and all involved state boundaries. *Pennsylvania* v. *Wheeling*
*311 * *Bridge Company,* 9 How. 657; *S. C.,* 11 How. 528; *S. C.,* 13 How., 518; *S. C.,* 18 How. 429, was a case in equity involving the free and unobstructed navigation of the Ohio River which caused a special damage to the plaintiff State for which there was no adequate remedy at law.

The Commonwealth of Virginia has no such interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her any standing in a court of equity in relation thereto.

The right of Virginia to maintain a suit as sole plaintiff therein, must be determined by the well settled rules of equity practice as recognized and enforced by the English Court of Chancery, and as understood and applied by this court.

Virginia has no interest in these certificates, nor can her interests be in any manner affected by a decree in relation to these certificates.

If she has any connection with this part of the suit it is as its mere promoter, by virtue of her promise to the holders of the certificates—an agent for them—only an instrumentality for the institution of this suit.

This is not such interest as to support a suit in equity. The plaintiff's interest must be as substantial and certain as that of the defendant. *Smith* v. *Hollenbeck,* 46 Illinois, 252; *Smith* v. *Brittenham,* 109 Illinois, 540; *Ashby* v. *Ashby,* 39 La. Ann. 105; *S. C.,* 1 So. Rep. 282; *Field* v. *Maghee,* 5 Paige, 539; *Rogers* v. *Traders' Ins. Co.,* 6 Paige, 583; *Sedgwick* v. *Cleveland,* 7 Paige, 267.

The real owners of the deferred certificates have such a substantial interest and right of ownership therein as to make them indispensable parties, whose presence would oust the court of its jurisdiction.

The practice in this court in cases in equity is regulated by the former practice of the courts of chancery in England. And in cases of original jurisdiction it will frame its proceedings according to those which had been adopted in
*312 the English courts in analogous cases, and follow the general rules * of those courts in conducting a cause to a finality. *California* v. *Southern Pacific Railroad,* 157 U. S. 229, 249.

The only instance wherein the court will deviate from or refuse to follow

this practice is when it impairs the case by unnecessary technicalities, or defeats the purpose of justice. *California* v. *Southern Pacific Ry. Co., supra;* citing *Florida* v. *Georgia,* 17 How. 478; *Caldwell* v. *Taggart,* 4 Pet. 190; *Barney* v. *Baltimore,* 6 Wall. 280.

In the case before the court the holders of the deferred certificates, who own both the legal and equitable title thereto, are not made parties. The only plaintiff seeking relief is the State of Virginia, who has brought the suit in her own name without any title to this part of the subject matter of the suit, and without any direct or substantial interest in the result thereof. The purpose of this suit is to settle the liability of West Virginia on these deferred certificates to the owners and holders thereof, and any decree which is rendered in this case must relate solely to their rights. The court cannot enter any decree with reference to these certificates which must not necessarily affect the interests of these outstanding owners and holders, who are not before the court either as plaintiffs or defendants.

The purpose of the bill is not only to fix a liability on the State of West Virginia for the payment of these certificates, but also for an accounting to determine the extent of this liability. So it is clearly and at once perceivable that the holders of these certificates are vitally interested as to both of these purposes of the suit.

The fact that the commissioners of the Sinking Fund and Literary Fund of Virginia have in their possession comparatively small portions of the said certificates issued by the plaintiff does not give the plaintiff any cause of action against the defendant.

The plaintiff cannot assert the claim which she sets forth in her bill in a court of equity.

*313 The prosecution of this suit by Virginia is solely in the * interests of the owners and holders of the deferred certificates issued by Virginia herself without recourse upon her, and set apart as a liability of West Virginia to the holders of the old obligations, which have been surrendered to the State of Virginia and by her cancelled in accordance with her own acts of legislation.

She therefore cannot come into a court of equity to assert a right of contribution against West Virginia; the decree which she seeks to obtain cannot inure to her benefit, but only to that of the holders of the deferred certificates; she must have paid everything for which she and the new State were jointly liable so as to relieve the new State from all liability before she can seek contribution from her joint obligor.

That this is the principle upon which rests the equitable right of contribution is the recognized and well settled doctrine of the courts. *Springer* v. *Foster,* 21 Ind. App. 15; *S. C.,* 60 N. E. Rep. 720; *Kirkpatrick* v. *Murphy,* 3 N. J. Law, 506; *Grove* v. *O'Brien,* 1 Maryland, 438; *Rooker* v. *Benson,* 83 Indiana, 250, 256; *Zook* v. *Clemmer,* 44 Indiana, 15; *Pegram* v. *Riley,* 88 Alabama, 399; *S. C.,* 6 So. Rep. 753; *Screven* v. *Joiner,* 1 Hill Ch. 252; *S. C.,* 26 Am. Dec. 199.

The party seeking contribution must have paid more than his share in order to maintain a suit for contribution. 9 Cyc. 699; 3 Am. & Eng. Dec. in Eq. 163.

The demand made by Virginia which she claims arises out of the acts of her General Assembly, passed February 3d and 4th, respectively, in the year 1863, whereby she transferred certain real and personal property belonging to her to be used by the new State when created and organized, if it has any validity, which is not conceded here, is purely a legal demand and one which cannot be asserted under any circumstances in a court of equity.

If it be an equitable demand, upon what principle or doctrine of equity does

it rest? It is not secured by any lien; it is not in the nature of a trust; it rests upon no equities to be asserted in order to enter a decree or to make the
*314 claim * available. It is simply a money demand for the value of property which the plaintiff claims was used and appropriated by the defendant for which payment should be made.

In the Federal courts the right of trial by jury under the Seventh Amendment cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in a legal action may be preserved intact. *Scott* v. *Neely,* 140 U. S. 106, 117.

This court has no jurisdiction to settle or determine the principle upon which West Virginia shall be made liable for any portion of the old debt of Virginia, because this was matter of contract between Virginia and West Virginia upon the admission of the latter into the Union.

When West Virginia framed her constitution and inserted in it the provision concerning the public debt of Virginia created prior to 1861, and the State of Virginia through her legislature accepted the constitution of West Virginia as the basis of her consent, this created a compact between the two States and was absolutely binding both upon Virginia and West Virginia.

By this compact between Virginia and West Virginia, the former State referred to the legislature of the latter the matter of ascertaining "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and therefore this "proportion" cannot be otherwise ascertained or determined than by the consent of the State of West Virginia; nor can its liquidation be otherwise provided for than by a sinking fund sufficient in amount to pay the accruing interest, and redeem the principal of whatever sum may thus be ascertained as the equitable proportion that West Virginia agreed to assume. Virginia referred this matter absolutely to the judgment of
*315 the legislature of West * Virginia and tacitly agreed to abide by the action of this legislative body.

This stipulation or compact between Virginia and West Virginia, with reference to the public debt of the former, is a valid and binding contract, and Virginia can do nothing, either by legislation or otherwise, to impair its obligation. West Virginia has the undoubted moral and legal right to stand upon its terms; and if in the exercise of its judgment exercised upon a basis just and equitable, it should be ascertained by the legislature of West Virginia that the State owes nothing to the bondholders of the old debt of Virginia, then there is no obligation whatever subsisting which can be enforced by the holders of any part of the old debt of Virginia, and especially has Virginia herself no cause of action against this State.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

The State of West Virginia was admitted into the Union June 20, 1863, under the proclamation of the President of the United States of April 20, 1863, in pursuance of the act of Congress approved December 31, 1862, upon the terms and conditions prescribed by the Commonwealth of Virginia in ordinances adopted in convention and in acts passed by the General Assembly of the "Restored Government of the Commonwealth," giving her consent to the formation of a new State out of her territory, with a constitution adopted for the new State by the

people thereof. The ninth section of the ordinance adopted by the people of the "Restored State of Virginia" in convention assembled in the city of Wheeling, Virginia, on August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," provided as follows:

"9. The new State shall take upon itself a just proportion of the pub-
*316 lic debt of the Commonwealth of Virginia, prior to * the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia. . . ."

The consent of the Commonwealth of Virginia was given to the formation of a new State on this condition. February 3 and 4, 1863, the General Assembly of the "Restored State of Virginia" enacted two statutes in pursuance of the provisions of which money and property amounting to and of the value of several millions of dollars were, after the admission of the new State, paid over and transferred to West Virginia. The constitution of the State of West Virginia when admitted contained these provisions, being sections 5, 7 and 8 of Article VIII thereof, as follows:

"5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

"7. The legislature may at any time direct a sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt; and hereafter the State shall not become a stockholder in any bank. . . ."

"8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation
*317 thereof, by a sinking fund sufficient to pay the accruing * interest, and redeem the principal within thirty-four years."

The "public debt" and the "previous liability" manifestly referred to a portion of the public debt of the original State of Virginia and liability for the money and property of the original State, which had been received by West Virginia under the acts of the General Assembly above cited, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia, though one may be involved in the other; while the provisions of sections 7 and 8 were obviously framed in compliance with the conditions on which the consent of Virginia was given to the creation of the State of West Virginia, and the money and property were transferred. From 1865 to 1905 various efforts were made by Virginia through its constituted authorities to effect an adjustment and settlement with West Virginia for an equitable proportion of the public debt of the undivided State, proper to be borne and paid

by West Virginia, but all these efforts proved unavailing, and it is charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia.

The original jurisdiction of this court was, therefore, invoked by Virginia to procure a decree for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts, the adjudication and determination of the amount due Virginia by West Virginia in the premises.

But it is objected that this court has no jurisdiction because the matters set forth in the bill do not constitute such a controversy or such controversies as can be heard and determined in this court, and because the court has no power to enforce and therefore none to render any final judgment or decree herein. We think these objections are disposed of by many decisions of this court. *Cohens* v. *Virginia,* 6 Wheat. 264, 378, 406; *Kansas* v. *Colorado,* 185 U. S. 125; *Kansas* v. *Colorado,* May 13, 1907, *ante,* p. 46; *Missouri* v. *Illinois,* 180 U. S. 208;
*318 *S. C.,* 200 U. S. 496; *Georgia* v. *Copper Company,* May 13, * 1907, *ante,* p. 230; *United States* v. *Texas,* 143 U. S. 621; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *Michigan,* 190 U. S. 379.

In *Cohens* v. *Virginia,* the Chief Justice said: "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State.' 'and between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

And, referring to the Eleventh Amendment, it was further said:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the Nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was
*319 not much reason to fear that foreign or sister States would * be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

By the cases cited, and there are many more, it is established that, in the exercise of original jurisdiction as between States, this court necessarily in such a case as this has jurisdiction.

United States v. *North Carolina* and *United States* v. *Michigan, supra,* were controversies arising upon pecuniary demands, and jurisdiction was exercised in those cases just as in those for the prevention of the flow of polluted water from one State along the borders of another State, or of the diminution in the natural flow of rivers by the State in which they have their sources through and across another State or States, or of the discharge of noxious gases from works in one State over the territory of another.

The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that State to Virginia, and when this court has ascertained and adjudged the proportion of the debt of the original State which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced. Consent to be sued was given when West Virginia was admitted into the Union, and it must be assumed that the legislature of West Virginia would in the natural course make provision for the satisfaction of any decree that may be rendered.

It is, however, further insisted that this court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of West
*320 Virginia to Virginia was submitted to the arbitrament and award * of the legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the constitution of West Virginia when admitted into the Union contained the provision: "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years." And it is said that, on May 13, 1862, the legislature of Virginia passed an act entitled "An act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State," by which consent was given to the creation of the proposed new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861;" and that by the act of Congress the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two States. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided "for the formation of a new State out of the territory of this State," and declared therein that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should "ascertain the same as soon as practicable," it referred to the method of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia,* it
*321 follows * that what was meant by the expression that the "legislature shall ascertain" was that the legislature should ascertain as soon as practicable

the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained. And it may well be inquired why, in the forty-three years that have elapsed since the alleged compact was entered into, West Virginia has never indicated that she stood upon such a compact, and, if so, why no step has ever been taken by West Virginia to enter upon the performance of the duty which such "compact" imposed, and to notify Virginia that she was ready and willing to discharge such duty.

It is also urged that Virginia had no interest in the subject matter of the controversy because she had been released from all liability on account of the public debt of the old Commonwealth, evidenced by her bonds outstanding on the first day of January, 1861. This relates to the acts of the General Assembly of Virginia of March 30, 1871, March 28, 1879, February 14, 1882, February 20, 1892, March 6, 1894, and March 6, 1900. According to the bill, Virginia by the act of March 30, 1871, and subsequent acts, in an attempt to provide for the funding and payment of the public debt, having estimated that the liability of West Virginia was for one-third of the amount of the old bonds, provided for the issue of new bonds to the amount of two-thirds of the total, and for the issue of certificates for the other third, which showed that Virginia held the old bonds so far as unfunded in trust for the holders or their assignees to be paid by the funds expected to be obtained from West Virginia as her "just and equitable proportion of the public debt." The legislation resulted in the surrender of most of the old bonds to Virginia, satisfied as to two-thirds, and held as security for the creditors as to one-third. We do not care to take up and discuss this legislation. We are satisfied that as we have jurisdiction, these questions ought not to be passed upon on demurrer. *Kansas* v. *Colorado,* 185 U. S. 125, 144, 145. And this also furnishes sufficient ground for not considering at length the objection of mul-
*322 tifariousness. *The observations of Lord Cottenham, in *Campbell* v. *Mackay,* 1 Mylne & Craig, 603, that it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must be left where the authorities leave it, to the sound discretion of the court, have been often affirmed in this court. *Oliver* v. *Piatt,* 3 How. 333, 411; *Gaines* v. *Relf,* 2 How. 619, 642. But we do not mean to rule that the bill is multifarious. It is true that the prayer contains, among other things, the request, "that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix in her own right and as trustee aforesaid," but it also prays that the court "will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises." And we understand the reference to holding in trust to be in the interest of mere convenience, and that the bill cannot properly be regarded as seeking in chief anything more than a decree for "an equitable proportion of the public debt of the Commonwealth of Virginia on the first day of January, 1861." The objections of misjoinder of parties and misjoinder of causes of action may be treated as resting on matter of surplusage merely, and at all events further consideration thereof may wisely be postponed to final hearing. *Florida* v. *Georgia,* 17 How. 491, 492; *California* v. *Southern Pacific Company,* 157 U. S. 249.

The order will be—

Demurrer overruled without prejudice to any question, and leave to answer by the first Monday of next term.

State of Virginia v. State of West Virginia

Supreme Court of the United States, 1908.

[209 *United States,* 514.]

Order referring cause to master and directing conditions under which testimony shall be taken and master shall report to this court.

Defendant's demurrer having been overruled, 206 U. S. 290, *322,* and defendant having answered, both complainant and defendant submitted and sustained by argument forms of decree referring the cause to a master.[1]

Mr. William A. Anderson, Attorney General of the State of Virginia, and *Mr. Randolph Harrison,* for complainant:

*515 The differences go rather to matters of procedure than to * any question of principle, as between pars. III and IV, complainant's draft, and par. VII, defendant's draft.

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[1] Complainant's draft of decree referring the cause to a master.

This cause coming on this day to be heard upon the complainant's bill and the exhibits filed therewith, the answer of the defendant, with the exhibits filed therewith, and the general replication filed by the complainant thereto, was argued by counsel. On consideration whereof it is adjudged, ordered, and decreed that this cause be referred to —— ——, who is hereby appointed a special master herein, who, after giving not less than ten days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will without delay ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

What amount and proportion of said indebtedness and of the interest accrued thereon should in equity be apportioned to and be now paid by the State of West Virginia.

(Complainant subsequently suggested the following substitute for paragraph II.)

II.

What is the just amount and proportion of said debt, including the interest thereon which should now be apportioned to, and paid by, the State of West Virginia? Such amount and proportion of said debt the master will ascertain by charging against West Virginia:

(1) All expenditures made by the State of Virginia within the territory which now constitutes the State of West Virginia since any part of said debt was contracted.

(2) Such proportion of the ordinary expenses of the Government of Virginia since any part of said debt was contracted as was fairly assignable to the counties which were erected into the State of West Virginia

In ascertaining this, the master will take as the basis or criterion upon which the apportionment of said expenses shall be made the average total population of Virginia, excluding slaves, as nearly as the same can be determined from the United States Census for each of the decades in which such expenses were incurred and paid.

(3) The amount and value of all money, property, stocks, and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and not including any property, stocks, or credits which were obtained or acquired by said Commonwealth after the 19th day of June, 1861, the date of the organization of the restored government of Virginia.

*516 Complainant asks that the provisions expressed in pars. III, * IV and V, its draft, be embodied in the decree for reasons which will be apparent on reading those paragraphs.

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(5) From the aggregate of the amounts thus ascertained, the master will deduct all moneys paid into the treasury of said Commonwealth from the counties included within the State of West Virginia during said period.

(6) The balance thus ascertained, with interest thereon from the 1st day of January, 1861, until the same shall be paid, will be the amount and proportion of the debt of the Commonwealth of Virginia existing before that date, assignable to West Virginia and which that State should pay.

III.

He will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court.

It is further adjudged, ordered, and decreed as follows:

(1) To the end that full and complete information may be afforded the master as to all matters involved in the inquiries with which he is charged by this decree, the Commonwealth of Virginia and the State of West Virginia shall each of them respectively produce before the master, or give him access to, all such records, books, papers, and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to visit the capitals of Virginia and West Virginia, and to make or cause to be made such examinations as he may deem desirable of the books of account, documents, and public records of either State relating to the inquiries he is directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All published records published by authority of the Commonwealth of Virginia prior to the creation of the State of West Virginia and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the partition of her territory which, in the judgment of the master, may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master. The public acts and records of the two States since the creation of the State of West Virginia shall be evidence if pertinent and duly authenticated; but all such testimony tendered by either party shall be subject to proper legal exception as to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

(2) The master is authorized and empowered to employ such accountants, stenographers, or other clerical assistance as he may find it desirable to employ, and to secure such rooms or offices as he may require, in order to the prompt and efficient execution of this order of reference, and to agree with such accountants and stenographers, typewriters, and the owner of such room or rooms for such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

(3) The complainant will cause the sum of three thousand dollars to be deposited with the marshal of this court to the credit of this cause, on account of the costs and expenses of executing this decree and of this suit, and the complainant will cause such further sums as may be necessary to defray the costs and expenses of executing this decree to be from time to time in like manner deposited with said marshal. In the event that the defendant shall desire any special statement or accounts to be made, she shall in like manner, before the taking of any such account or the making of such special statement, cause the sum of —— dollars to be deposited with the marshal.

And the master is authorized from time to time to draw upon the funds so deposited by Virginia for the compensation of the accountants and other clerical assistants whom he may employ, and for any other costs or expenses, including stationery, printing, and room rent, which it may in his judgment be necessary to be incurred in promptly and efficiently executing this order of reference or making up any special statement or accounts asked for by the plaintiff, and the same will be charged up as part of the complainant's costs; and he will draw upon the fund deposited by the defendant for any costs which may be incurred in making up any special statement or accounts which may be desired by the defendant to be

*517 The serious objections to the defendant's draft of decree * are particularly to par. II, but also to pars. III, IV and V thereof.

Complainant's draft directs the master to take an account ascertaining:

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specially stated, which drafts, accompanied by proper vouchers, the marshal of this court will pay, and the same will be charged up as part of the defendant's costs in the cause.

And the said marshal is allowed to have and retain a commission of five per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

IV.

The first notice of the time and place fixed by the master for beginning the taking of the accounts directed by this decree shall be given at least thirty days before the date fixed by him therefor, provided that the date so fixed by the master for beginning the taking of said accounts shall not be a day earlier than February 20, 1907. The master may adjourn his sittings from time to time and place to place without notice to the parties. He will cause to be kept, in a minute book to be provided for the purpose, a journal or minutes of his sittings in the execution of this decree, showing the counsel present, if any, any adjournments which may be taken by him from time to time or place to place, and any other matters which the master may deem it proper to mention therein, which minute book or journal he will return with his report.

V.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys-General of the respective States.

Defendant's draft of decree referring the cause to a master.

This cause came on this day to be heard upon the complainant's bill and the exhibits filed therewith; the answer of the defendant, with the exhibits filed therewith; the general replication thereto by the complainant, and was argued by counsel, and on consideration of which it is adjudged, ordered, and decreed that this cause be, and the same is hereby, referred to —— ——, who is appointed a special master herein, who, after giving — days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

(*a*) The amount of state expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20, 1861.

(*b*) The aggregate ordinary expenses of the state government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of said indebtedness was contracted.

(*c*) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period.

III.

Whether any agreements, contracts, or arrangements, other than those appearing from the exhibits filed with the bill herein, have been made by the Commonwealth of Virginia with her creditors since January 1, 1861, with reference to said public debt created prior to said date, or to the satisfaction or discharge of said indebtedness or any part thereof.

IV.

The amount of certificates relating to said indebtedness issued by the Commonwealth of Virginia under the acts of her General Assembly, approved March 30, 1871, March 28, 1879,

*518 * "The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what
*519 form the same was evidenced, by what * authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness."

February 14, 1882, and February 20, 1892; and what amount, if any, of said certificates have been deposited since January 4, 1906, with the commission appointed under the joint resolution of the General Assembly of the Commonwealth of Virginia approved March 6, 1894; and he will also ascertain and report what amount of said certificates so deposited since said date were issued under the act of March 30, 1871; what amount were issued under the act of March 28, 1879; what amount were issued under the act of February 14, 1882, and what amount were issued under the act of February 20, 1892.

V.

The master will ascertain and report to what extent said certificates issued by the Commonwealth of Virginia represented the principal of one-third of said public debt and to what extent they represented the interest thereon, and the rate at which the interest was reckoned; and he will also ascertain and report whether there is included in said certificates, or in any of them, the interest, or any part of the interest, which had accrued on the portion of said public debt refunded by the Commonwealth of Virginia, and if so, what was the total amount of such interest and at what rate it was reckoned.

VI.

It is further ordered and decreed that the master shall ascertain and report what amount, if any, of the bonds or other evidences of debt issued by the Commonwealth of Virginia under the act of March 30, 1871, was subsequently surrendered by the holders thereof and exchanged for other bonds or evidences of debt issued under the acts of 1879, 1882, and 1892, and if such exchanges were made, the master will ascertain and report what rate of interest was agreed to be paid upon such new bonds or evidences of debt.

VII.

It is further ordered and decreed that the Commonwealth of Virginia and the State of West Virginia shall each produce before the master all such records, books, papers, and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to make or cause to be made such examination as he may deem desirable of the books of account, vouchers, documents, and public records of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the seventeenth day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of three thousand dollars to be deposited with the

*520 * The defendant's draft adopts this paragraph.

Par. II, plaintiff's draft, directs the master to take the following accounts:

"What amount and proportion of said indebtedness and of the interest accrued thereon, should in equity be apportioned to and be now paid by the State of West Virginia."

Par. II, defendant's draft, directs the master to take the following accounts:

(*a*) "The amount of state expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20th, 1861.

(*b*) "The aggregate ordinary expenses of the state government of the Commonwealth of Virginia, prior to January 1st, 1861, and since any part of said indebtedness was contracted.

(*c*) "All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period."

*521 * Par. III, plaintiff's draft, directs that the master "will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court."

Complainant objects to par. II, defendant's draft, on the ground that it seems to lend the sanction of the court in advance to a basis or scheme for the statement of the account, which is not shown by anything as yet in the cause to be either equitable or just.

Before any such question can be fairly adjudicated, it is necessary that the evidence in the case be taken and have the aid of its master in collating and thoroughly digesting it.

There is not enough in the record to enable the court to come to any just or definite conclusion as to the precise scheme which it would be equitable to adopt in stating the account. To do so at this stage of the litigation, would be to decide an important question in the case before the evidence is taken. The effect of par. II would be to have the court prejudge the case as to the basis on which the account shall be stated.

The case is now only submitted for a decree referring it to a master, to state and report to the court the data necessary to enable the court to justly decide it upon its merits.

If it should then appear that the basis prescribed by the Wheeling ordinance is binding upon the parties, and must be followed as the basis upon which the account shall be made up, that basis would be adopted. But if it should be then manifest that that arbitrary basis of settlement it not the one on which the ac-

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marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters, and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal is allowed to have and retain a commission of 5 per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys General of the respective States.

count should be stated, because it would, if applied to the facts of the case as they shall appear in the evidence, lead to absolutely unconscionable results and operate to impair the obligation of the contracts by which the common debt was created, contracts which were and are alike obligatory upon Virginia and upon West Virginia, or for any other valid reason, then the scheme of settle-
*522 ment indicated in the * Wheeling ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted.

Complainant contends that, while the Wheeling ordinance upon its face, prescribes an absolutely arbitrary basis of settlement, the representatives of Virginia are satisfied that upon a fair, reasonable and just construction of the language of that ordinance, and of the subsequent supplemental enactments, the scheme of settlement therein defined will, when applied to the facts as stated in the bill, and as it is believed they can be established by proofs, result in fixing the proportion of the debt of Virginia which West Virginia should assume and pay, inclusive of interest, at a very large sum, though not so large a sum as it would be equitable for West Virginia to pay.

The debt, a portion of which she was to pay, was an interest-bearing debt. It would be manifestly "just" and "equitable" that West Virginia should be required to pay interest as well as principal. Indeed, any settlement which does not require that State to pay interest during the long period of her default and refusal to pay anything, would be not only unjust, and inequitable, but iniquitous.

West Virginia came into the Union upon the distinct condition expressed in her constitution, that she would assume an equitable proportion of the common debt of the undivided State, as it existed prior to January 1, 1861, and would provide for the payment of the accruing interest and the redemption of the principal thereof.

While it is believed that, upon the facts stated in the bill and accompanying exhibits, and upon the proofs hereafter to be adduced in support thereof, West Virginia will owe a very large sum, even under the arbitrary scheme of the Wheeling ordinance, we submit that we should not, in the present status of the litigation, be tied down to the terms of that ordinance.

Another palpable objection to the defendant's draft is, that it excludes from the account the value of the property, assets, and money which West Vir-
*523 ginia has received from the Commonwealth. * Upon any basis of just accounting, these items should be brought into the account.

If the account should be stated on the basis of the Wheeling ordinance, these items would manifestly be proper charges against West Virginia. By the terms of that ordinance, Virginia's title to, and ownership of, all of the property and assets theretofore belonging to the Commonwealth remain intact.

By it, West Virginia would acquire no title to any of those assets or of that property. Framed as that ordinance was, by Western Virginians, and arbitrary, and on its face unjust, as were the criteria by which it undertook to provide that West Virginia's proportion of the common debt should be computed, its authors were not so conscienceless as to also propose that the new State, after making such an inadequate contribution to its share of a debt which had been chiefly contracted by the votes of the representatives of its people and for their benefit, should also have a share of the property and assets of the Commonwealth, free of charge.

All that was, by the terms of that ordinance, to be ceded by the Commonwealth to the new State, was political dominion, and jurisdiction over the people and territory embraced in the new State.

The meaning and effect of the ordinance was to leave the title to, and ownership of, the assets and property of the Commonwealth in the Commonwealth.

Another objection to the account called for by defendant's draft, is that it does not direct any account to be taken ascertaining the amount and proportion of the debt of Virginia on and prior to January 1, 1861, which West Virginia should assume and pay, but contents itself with merely directing the arbitrary and inconsequential accounts defined in par. II, defendant's draft.

Complainant's principal insista[e]nce is that defendant's draft of a decree prejudges the case in advance of a hearing upon the merits, while that tendered for the plaintiff cannot operate to the prejudice of either party, upon any
*524 material question in * the cause; by this draft the adjudication of these questions being left to await a hearing after the master's report shall be filed, upon the evidence then fully in the cause.

The precise accounts called for by par. II, defendant's draft, will be taken by the master if he shall find it necessary and proper to take them in order to ascertain the amount and proportion of the Virginia debt which West Virginia should pay; and if the master shall for any reason deem it unnecessary to take those accounts, the defendant can, under par. III, complainant's draft, have them stated as special accounts, if she shall be so advised.

Par. III of complainant's draft is designed to enable each party, or the master, to have alternative, or special statements of the accounts made up on any basis on which either party or the master may deem it proper or desirable that the same shall be stated.

By having the respective views and contentions of the complainant and the defendant thus presented in contrast in such concrete form, the court, with the assistance of the findings of the master, will be enabled more readily and intelligently to reach a just conclusion.

If the inquiries defined in pars. III, IV, V and VI, defendant's draft, have any pertinency to any question in the case, it must be because of something not yet in the record.

Complainant objects to them as being unnecessary and irrelevant.

There is nothing in the cause, or so far as we know out of it, to show that there is any foundation in fact for the inquiry mentioned in par. III, defendant's draft, as to whether Virginia has made any other contracts or arrangements with the public creditors, since January 1, 1861, in reference to the public debt. That inquiry, though harmless, is useless.

The accounts provided for in pars. IV and V, defendant's draft, are not pertinent to any issue in the cause.

Both relate to the certificates or receipts given by Virginia to the
*525 holders of the bonds issued by the Commonwealth before * her dismemberment, who have deposited these bonds with her.

Those certificates are in the nature of a declaration of trust by Virginia, that she holds said bonds (so far as they have not been funded in the new securities which the Commonwealth has given for about two-thirds of the aggregate amount thereof, principal and interest), for the benefit of the owners of the bonds deposited with her.

Those transactions cannot in any way affect any question in the cause.

The only function of those certificates is to show who are now entitled to the bonds which were so deposited with Virginia, and which she holds in her treasury for the benefit of these certificate holders, awaiting a settlement with West Virginia. These inquiries are unnecessary and useless.

The same objection applies to par. VI, defendant's draft. That relates to the obligations which were issued by Virginia, as now constituted, in settlement of the two-thirds of the old bonds funded, and payment of which was assumed by her.

That is a matter with which West Virginia has nothing to do, and which does not affect the rights or obligations of either party in respect to the claims asserted in complainant's bill.

Those new bonds given by Virginia for the two-thirds of the old bonds assumed by her, and accepted by the owners of the old bonds so deposited with Virginia, operated as a payment and discharge of the old bonds to the extent of the two-thirds thereof so funded.

West Virginia is not sued here to pay any part of that two-thirds so settled by Virginia. She is sued to have her assume and pay so much of the remaining unfunded third of the common debt of the undivided State, as may be West Virginia's equitable portion of the whole of the debt represented by the bonds of the original State. It has never been claimed or suggested that there was any liability on West Virginia beyond said unfunded third of the bonds of the original State which have been funded; or that West Virginia should pay more than
*526 * one-third of the bonds issued by Virginia prior to the formation of West Virginia, which have not been funded.

The liability of West Virginia on account of the common public debt, has sometimes been estimated by Virginia or her representatives at one-third thereof, but never at more than one-third, and Virginia has undertaken to take care of the other two-thirds with which West Virginia has nothing to do.

It is true, that there are some millions of the debt of the undivided State, which Virginia has paid in full, and holds the obligations so taken up by her as a claim against the new State, to the extent of West Virginia's equitable liability for contribution therefor; and the extent of that liability can be ascertained and stated in the account directed by par. II, complainant's draft.

There is no occasion for any of the accounts directed by pars. III, IV, V and VI, defendant's draft. If West Virginia wants any of them to be stated, she can have that done as a special statement under par. III of complainant's draft.

Mr. John G. Carlisle and *Mr. John C. Spooner,* with whom *Mr. C. W. May,* Attorney General of the State of West Virginia, *Mr. Charles E. Hogg, Mr. W. Mollohan, Mr. George W. McClintic* and *Mr. W. G. Matthews* were on the brief, for defendant:

The difference between the two proposed decrees is radical, and presents to the court a question which in our view is fundamental and which West Virginia contends, respectfully and very earnestly, should be decided before any reference to a master to state the account between the parties.

The jurisdiction of the court over this case is settled by the decision overruling the demurrer. We are quite aware that the court has recognized a distinction between suits by private parties in respect of the application of the rules of pleading and of practice, and suits between States. *Rhode Island* v. *Massachusetts,* 13 Peters, 23; *Rhode Island* v. *Massachusetts,* 14 Peters, 256.
*527 * West Virginia does not and could not successfully here contest the principles thus laid down, but the principles of equity and the rules of chancery procedure so far as essential to protect the rights of parties litigating in this tribunal will, of course, be substantially enforced. The application of some of the rules of procedure are certainly essential to substantial justice. 2 Bates, Fed. Eq. Pro. 802, § 753.

Thus it stands alleged in the bill and admitted by the answer, and if it were not admitted by the answer, it is conclusively established by the bill and its exhibits, that there was a solemn agreement entered into in 1861 between the State of Virginia and the new State of West Virginia, with the consent of the Congress, by which the latter State assumed (as one of the conditions of the assent of

Virginia to her becoming a State) a just proportion of the indebtedness of that Commonwealth as it existed prior to January 1, 1861, the manner of ascertaining which proportion was defined by the ordinance itself.

The ordinance was, as treated by this court in the case of *Virginia* v. *West Virginia,* 11 Wallace, 39, a proposition by the Commonwealth of Virginia to the people of the proposed new State. It was accepted by the constitutional convention of the proposed new State, carried into its constitution and adopted by the people; and when the State was admitted into the Union by the Congress, with the assent of Virginia, it became a completed compact between competent parties, upon adequate consideration, protected by the Constitution of the United States from impairment by either party.

The ordinance defines what would be a just proportion; for it provides not only for the assumption of a just proportion, but specifically in what manner that proportion shall be ascertained.

The obligation of a lawful compact between two States, justiciable in its nature, certainly is as binding in law upon both until abrogated by both in a constitutional way, as a contract between a State and an individual, or between two individuals, and a disregard or violation of it by one, certainly cannot thereby release it from its obligation.

*528 * From the averments of the bill and the admissions in the answer, and the argument at the bar, it cannot be an open question in this case that the only liability of West Virginia for an equitable proportion of the *ante-bellum* debt of Virginia is upon the basis of the ordinance.

The general rule stated in *Hartman* v. *Greenhow,* 102 U. S. 672, to the effect that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them, is essentially qualified by the authorities there quoted, in this, that a special agreement between the two States in respect of the assumption of a proportion of the debt as it existed before the separation, takes the case out of the general rule; so that the second ground alleged in the bill which specifically avers a special agreement, destroys the applicability of the rule to this case. This special agreement cannot be dismissed from this case as the decree proposed on behalf of Virginia would do. This court has sustained the validity of this ordinance in *Virginia* v. *West Virginia,* 11 Wallace, 39, in respect of the provision contained in it for the incorporation of the counties of Berkeley and Jefferson in the latter State conditioned upon a popular vote therefor.

If the ordinance was valid then in respect of the incorporation of these counties, it cannot be held to be invalid as to the specific provision contained in § 9 for the assumption by the new State of a just proportion of the indebtedness to be ascertained in the manner defined, clearly carried into the constitution of the new State and assented to by Congress by the admission of West Virginia into the Union.

Whether it was or was not the lawful government of Virginia was a political question. When the House of Representatives admitted the members of Congress from that State and the Senate admitted the senators elected by the legislature of the "Restored State," and the President recognized that govern-

*529 ment as the true government of Virginia, that forever settled * its legality and regularity beyond the power of judicial review and made valid its acts *ab initio.* But for that "Restored State of Virginia," and its recognition by the political departments of the Federal Government, there would have been no government of Virginia under the Constitution of the United States from April, 1861, to the close of the war. The ordinance of the Wheeling convention of 1861, which was the genesis of the State of West Virginia, and the adoption of its con-

stitution, are, from the standpoint of law, as clearly acts of the Commonwealth of Virginia as if they had taken place in 1851 instead of in 1861.

An agreement between States, such as this special agreement in respect to the proportion of the debt of Virginia which was to be assumed by the State of West Virginia, when consented to by Congress, binds the citizens of both States, and is irrevocable by either party. Where the legislation of either has attempted to impair the obligation of a compact, it has been held void under the Constitution of the United States. *Greene* v. *Biddle,* 8 Wheat. 1; *Rhode Island* v. *Massachusetts,* 12 Peters, 748, and cases cited.

The Wheeling ordinance was carried into the constitution of West Virginia as follows:

"ARTICLE VIII. Section 8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years."

The convention assembled within ninety days after the adoption of the ordinance. Its sole warrant for assembling was the ordinance. Its authority to frame the constitution was derived from the ordinance. The ordinance as a whole was a proposition to that convention and, as a whole, was accepted by the convention. The convention complied with all the provisions of the ordinance.
*530 The constitution was framed to * meet all the requirements of the ordinance. It was the basis of the constitution.

The inconsistent attempt to eliminate the ordinance from the case—the present posture of counsel for Virginia—is in order that the ordinance may be eliminated, and § 8 of the first constitution is to be construed as the assumption by the new State of an equitable proportion of the public indebtedness of Virginia prior to January 1, 1861, upon the basis of population and territory. Such cannot be the law of this case. The assembling of the convention was an acceptance of § 9 of the ordinance. The ordinance embodied the conditions, and § 9 by no means the least important of them, of Virginia's consent to the erection of the new State out of her territory.

The suggestion that § 8 of Article 8 of the constitution had no reference to § 9 of the ordinance, assumes that the new State was taking upon herself an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, without definition or understanding as to the basis upon which it was to be ascertained, therefore leaving open the vital question as to what would constitute an equitable proportion, for future adjustment between the two States. This is not to be believed.

The debt of Virginia on January 1, 1861, was doubtless well known throughout the State of Virginia. It is alleged in the bill that about $33,000,000 of it were incurred in connection with the construction of works of internal improvement. If it had been the purpose of Virginia, in requiring as a condition of her assent, the assumption by the proposed new State of an equitable proportion of the public debt without specification as to the manner in which, and the basis upon which that proportion should be ascertained, it is inconceivable that the language of § 9 of the ordinance would have been what it was, and that the language of § 8 of Article 8 of the constitution would have been what it was. It was entirely for Virginia to dictate the terms, and if it had been her purpose to require an assumption of the debt upon the basis of territory and popula-
*531 tion, * West Virginia would have been required to assume "one-third of the debt as it existed prior to the first day of January, 1861," or "an equitable proportion to be ascertained upon the basis of territory and population."

If the ordinance be valid and binding, it cannot be disregarded by the court. While West Virginia could not by any suit prevent Virginia from disregarding it in the adjustment with her creditors of her debt or any portion of it, when Virginia invokes the original jurisdiction of this court in a suit against West Virginia to compel her to account for an equitable proportion of her debt prior to January 1, 1861, upon the basis of the ordinance and upon other and different bases, she may plead the ordinance as the only basis upon which the court can decree an accounting by her. The court will not make a new contract for the parties. They were competent to make one for themselves, and they did make one for themselves. It is unfortunate that the two States were unable many years ago to adjust the matter in accordance with the agreement which they had entered into and which subsists between them.

West Virginia is entitled to have the question whether or not the special agreement as to what shall constitute a just proportion of the debt solemnly entered into between the two States is binding, determined at this juncture by the court and, if it be held to be a binding agreement, Virginia is entitled to no accounting with West Virginia in this suit for her equitable proportion of the debt of the Commonwealth prior to January 1, 1861, except under the terms of that ordinance, carried into the constitution.

Complainant's draft directs that the master—"III. Make and return with his report any special or alternative statements of the account between the plaintiff and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court." This asks the court to leave the determination of the pivotal point in the case, which defendant contends should be decided by it in advance of an accounting, to a master, albeit only
*532 in * an advisory way, and it gives West Virginia permission to have an accounting made, if she desires it, on the basis of the ordinance at her own expense. She is defendant here. In that event we would have two lines of investigation proceeding before the master at the same time, each entirely distinct in basic principle from the other, each burdensome in labor, expense and the consumption of time. Neither would throw any light upon the other. An exhaustive accounting under the ordinance would not aid the court in determining whether it is binding and the only legal basis of settlement or not. An exhaustive investigation upon the international law basis would no more aid the court in determining whether the ordinance is binding and therefore the sole ground upon which the liability of West Virginia to an accounting at all can be based. If the compact is in force, any accounting save under that will be not only burdensome, but superfluous.

Defendant's draft is in literal execution of the contract of the parties, as evidenced by the ordinance and § 8 of the first constitution.

It directs the master to ascertain and report:

(*a*) The amount of state expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of August 20, 1861.

Defendant agrees that the last clause need not be inserted.

(*b*) To ascertain the aggregate ordinary expenses of the state government of the Commonwealth prior to January 1, 1861, and since any part of said indebtedness was contracted.

(*c*) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during the said period.

The items (*a*) and (*b*) are, under the ordinance, to be charged to West Virginia.

*533 The item (*c*) is under the ordinance to be credited to the * State of West Virginia, and when these three steps shall have been taken, and the two items charged, and the one item credited, the sum which it was agreed between the two States should constitute a just proportion of the debt of the Commonwealth of Virginia prior to January 1, 1861, which West Virginia assumed, will have been ascertained. These provisions are not "arbitrary and inconsequential items."

They are the items which Virginia herself framed and required to be accepted by the proposed new State as a condition of assent to her separation and admission into the Union.

There is but one item in § 9—defining the manner in which the account should be taken in order to ascertain the proportion of the debt to be taken upon herself by the proposed new State—left at all indefinite, and that is item (*b*), " 'a just proportion' of the ordinary expenses of the state government, since any part of said debt was contracted." This involves a determination of the basis upon which a "just proportion" of the aggregate ordinary expenses of the state government during the said period is to be ascertained. Shall it be population or territory, or both, or taxable values? Defendant contends that it should be based upon population, since "government"—including the administration of justice, the making and administering of the laws, the education of the children through a system of common schools, academies and a state university, the maintenance of state institutions, the support of prisoners, the care of the insane and paupers, and the like—is for people, not acres. Defendant suggests there should be added to defendant's draft, in respect of an ascertainment of the aggregate ordinary expenses of the State, a direction to the master to find alternatively certain facts substantially as follows: "For the purpose of enabling the court to determine the just proportion of the aggregate of the ordinary expenses of the state government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of said indebtedness was contracted, said master shall ascertain and report the

*534 population during the said period of the counties now constituting * the Commonwealth of Virginia, and separately the population of the counties now constituting the State of West Virginia, as shown by the decennial censuses taken during the said period by the United States, and also the average population of Virginia during each of said periods of ten years."

The aggregate ordinary expenses being found, and the items suggested as to population, it will be easy to determine the "just proportion" if that is the proper basis.

This case should not be cast at large, with no definition of the principles to govern his action, into the hands of a master; that at least it should be settled before a reference for the purpose of taking an account, whether the liability of West Virginia to Virginia is upon the special agreement which preceded and accompanied her admission into the Union, or, because of the absence of a special agreement, upon the basis of population and territory.

It will be observed that in par. II, complainant's draft, the master is not only directed to ascertain the amount and proportion of said indebtedness, but "of the interest accrued thereon."

Defendant objects to this paragraph because there is no legal ground for directing the ascertainment of interest. West Virginia has not obligated herself in any manner for the payment of interest. A State is not liable to pay interest unless it has expressly contracted to do so. See *United States* v. *North Carolina,* 136 U. S. 211.

See also, following this principle, *Sawyer* v. *Colgan,* 102 California, 293; *Hawkins* v. *Mitchell,* 34 Florida, 421, 422; *Molineux* v. *State,* 109 California, 380; *Flint &c. R. R.* v. *Board of Auditors,* 102 Michigan, 502; *Carr* v. *State,* 127 Indiana, 204.

See also note, 22 American State Reports, 448.

By leave of court, *Mr. Holmes Conrad* made an argument herein as *amicus curiae.*

On May 4, 1908, THE CHIEF JUSTICE announced the following decree:

This cause having been heard upon the pleadings and accompanying
*535 * exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated,[1] to ascertain and report to the court:

1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and value[2] of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.

6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced
*536 in any of the preceding items and * not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof.

The answers to these inquiries to be without prejudice to any question in the cause.

It is further ordered that the Commonwealth of Virginia and the State of West Virginia shall each, when required, produce before the master, upon oath, all such records, books, papers and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts, or any of them.

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[1] On June 1, THE CHIEF JUSTICE announced the appointment of Mr. Charles E. Littlefield, a member of the bar of this court as special master.

[2] A motion having been made to modify the decree this paragraph was amended by the court of June 1 so as to read "The extent and assessed valuation &c." and in all other respects the motion was overruled.

And the master is authorized to make, or cause to be made, such examination as he may deem desirable of the books of account, vouchers, documents and public records of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the seventeenth day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

*537 * The master is authorized and empowered, subject to the approval of the Chief Justice, to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of five thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal shall receive such commission for his services in receiving and disbursing the funds so deposited with him as may be allowed by the court, and he will make a report of his transactions, receipts and disbursements in the premises.

Any notices to be given in connection with the execution of this decree may be given by and to the Attorneys General of the respective States.

The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court.

And the court reserves the consideration of the allowance of interest; of the costs of this suit, and all further directions until after the master has made his report; either of the parties to be at liberty to apply to the court as they shall be advised.[1]

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[1] For the succeeding phase of this case see *Virginia* v. *West Virginia* (220 U. S. 1), *post*, p. 1650.—Editor.

State of Washington v. State of Oregon.

Supreme Court of the United States, 1908.

[211 *United States,* 127.]

Congress cannot change the boundary of a State without its consent.

In the absence of specific statement to that effect, the middle of a river, or the middle of the main channel of a river, is not necessarily the exact line when such river separates two States, and where the boundary is properly established in the center of a particular channel, it so remains, subject to changes by accretion, notwithstanding another channel may become more important and be regarded as the main channel of the river.

The fact that the south channel of the Columbia River has become more important than the north channel has not changed the boundary between the States of Oregon and Washington as fixed by the act of February 14, 1859, c. 33, 11 Stat. 383, admitting Oregon to the Union; and that boundary at Sand Island is the center of the north channel of the Columbia River, subject only to changes by accretion.

The boundary line between Oregon and Washington established as indicated on maps annexed to the opinion.

In boundary cases where both parties are alike interested the costs are equally divided between them.

*128 THIS is an original suit, commenced in this court on February * 26, 1906, by the State of Washington against the State of Oregon to determine their boundary line. Pleadings were filed, testimony taken before a commissioner by consent of the parties, and on these pleadings and proofs the case has been argued and submitted. The maps or charts accompanying this opinion have been prepared from exhibits filed by the parties, and will aid to an understanding of the case.

A brief chronological statement is that on August 14, 1848, the Territory of Oregon was established, c. 177, 9 Stat. 323, and on March 2, 1853, the Territory of Washington, including all that portion of Oregon Territory lying north of the middle of the main channel of the Columbia River. C. 90, 10 Stat. 172. On February 14, 1859, Oregon was admitted into the Union. The boundary, so far as is important in this controversy is as follows: C. 33, 11 Stat. 383:

"Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast, lying west and opposite the State, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla."

On February 22, 1889, an act was passed providing for the admission of Washington. C. 180, 25 Stat. 676. On November 11, 1889, the President, as authorized by § 8, of the statute last referred to, issued his proclamation, declaring Washington duly admitted into the Union. 26 Stat. 1552. The material part of the boundary described in the constitution of that State is—

"Beginning at a point in the Pacific Ocean one marine league due west of

and opposite the middle of the mouth of the north ship channel of the Columbia River, thence running easterly to and up the middle channel of said river
*129 and where * it is divided by islands up the middle of the widest channel thereof to where the forty-sixth parallel of north latitude crosses said river, near the mouth of the Walla Walla River." Art. XXIV, § 1; Hill's Stats. & Codes of Washington, vol. 2, p. 851.

Mr. E. C. Macdonald, with whom *Mr. John D. Atkinson,* Attorney General of the State of Washington, *Mr. Samuel H. Piles, Mr. A. J. Falknor* and *Mr. J. B. Alexander* were on the brief, for complainant:

The true boundary line is the varying center or middle of that channel of the river which is best suited and ordinarily used for the purposes of navigation. This proposition is conclusively sustained by decision of this court. *Nebraska* v. *Iowa,* 143 U. S. 359, where the following cases and works are cited: *New Orleans* v. *United States,* 10 Pet. 662, 717; *Jones* v. *Soulard,* 24 How. 41; *Banks* v. *Ogden,* 2 Wall. 57; *Saulet* v. *Shepherd,* 4 Wall. 502; *St. Clair* v. *Lovingston,* 23 Wall. 46; *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178; Angell on Water Courses; Gould on Waters, § 159; *Trustees* v. *Dickinson,* 9 Cush. 544; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535; *Hagan* v. *Campbell,* 8 Porter (Alabama), 9; *Murray* v. *Sermon,* 1 Hawks (Nor. Car.), 56. When a navigable river constitutes the boundary between two independent States, the line, defining the point at which the jurisdiction of the two separates, is well established to be the middle of the main channel of the stream. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. *Iowa* v. *Illinois,* 147 U. S. 1.

The same doctrine was announced and followed in *Missouri* v. *Nebraska,* 196 U. S. 23. See also *Louisiana* v. *Mississippi,* 202 U. S. 1 (p. 49).

*130 * *Mr. A. M. Crawford,* Attorney General of the State of Oregon, with whom *Mr. I. H. Van Winkle, Mr. Harrison Allen, Mr. C. W. Fulton* and *Mr. A. M. Smith* were on the brief, for defendant:

Assuming our position, on the facts, as to the position of the line as established by the act admitting Oregon into the Union, to be correct, it follows that the line must remain the same unless it has been changed by consent of the State of Oregon, or under the doctrine of accretion as defined by this court.

It was held in the case of *Indiana* v. *Kentucky,* 136 U. S. 479, in substance, that after the boundaries of a State are established by act of Congress and the State admitted as a member of the Union of States, such boundary cannot be changed without the consent of such State, except by accretion as before stated. The decision of the court is stated in the syllabus as follows:

"The dominion and jurisdiction of a State, bounded by a river, continue as they existed at the time it was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river."

The above doctrine is sustained by the following cases: *Missouri* v. *Kentucky,* 11 Wall. 401; *Nebraska* v. *Iowa,* 143 U. S. 359, and cases cited.

The doctrine of the *Nebraska-Iowa case* is approved in *Shively* v. *Bowlby,* 152 U. S. 36.

The same doctrine is supported by the following authorities: Bishop's New Criminal Law, § 150; *Coulthard* v. *Stevens,* 35 American State Reports, 304, and note 307; Opinions of Attorney General (U. S.), vol. 8, p. 175; *Hagan* v. *Campbell,* 33 Am. Dec. 267, and note 276; *Mulry* v. *Norton,* 100 N. Y. 424, 429; *S. C.* 53 Am. Rep. 206, and note 215.

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

*131 The northern boundary of the State of Oregon was established * prior to that of the State of Washington, and it is not within the power of the National Government to change that boundary without the consent of Oregon. Nor, indeed, was there any attempt to change it. The same description is found in both the act admitting Oregon and in the constitution of Washington, under which that State was admitted. It will be perceived that the starting point in the line running up the Columbia River is a point "due west and opposite the middle of the north ship channel of the Columbia River." This language implies that there was more than one channel, and the middle of the north channel was named. There were at that time two channels, and the northerly one ran to the north of what is called "Sand Island." This is shown by abundant testimony, and is admitted by counsel for complainant. At that time the north channel was perhaps the better one—at least one quite generally used by vessels passing in and out of the river, although the quantity and direction of the wind was an important factor. It is true there has been no little variation in the channels at and near the entrance as might be expected considering the great width of the mouth and the sandy character of the soil underneath a large part of the river. The earliest known chart is a sketch made in 1792 by Admiral Vancouver, which does not show Sand Island, but discloses two inside channels uniting and crossing the bar into the ocean with a depth of twenty-seven feet. Chart "A," made by the United States authorities in 1851, shows the condition of the mouth of the river as it then existed. The two channels are plainly disclosed. The brown color indicates land above low-water mark; the yellow, water of 18 feet in depth or less, and the white, water over 18 feet in depth. See notation at the upper left hand corner. The existence of the two channels clearly opened the way for a selection of one as the boundary, and the north one was adopted. Sand Island appears as a small body of land surrounded by shoal water. Another chart was prepared in 1854, which of all the charts and maps is the nearest
*132 in point of time to the admission of * Oregon. On this, as in Chart "A," Sand Island is shown, and the two channels, one north and the other south of the island. It is called an island, but it was little more than a sand bar. By the action of the waters it had been gradually moving northward, but the general configuration of the mouth of the river was unchanged. Since then the
*133 movement of Sand * Island has continued, the north channel has been growing more shallow, and the southern channel has become the one most used. The movements of Sand Island and the changes in the entrance are shown in Chart "B."

WASHINGTON

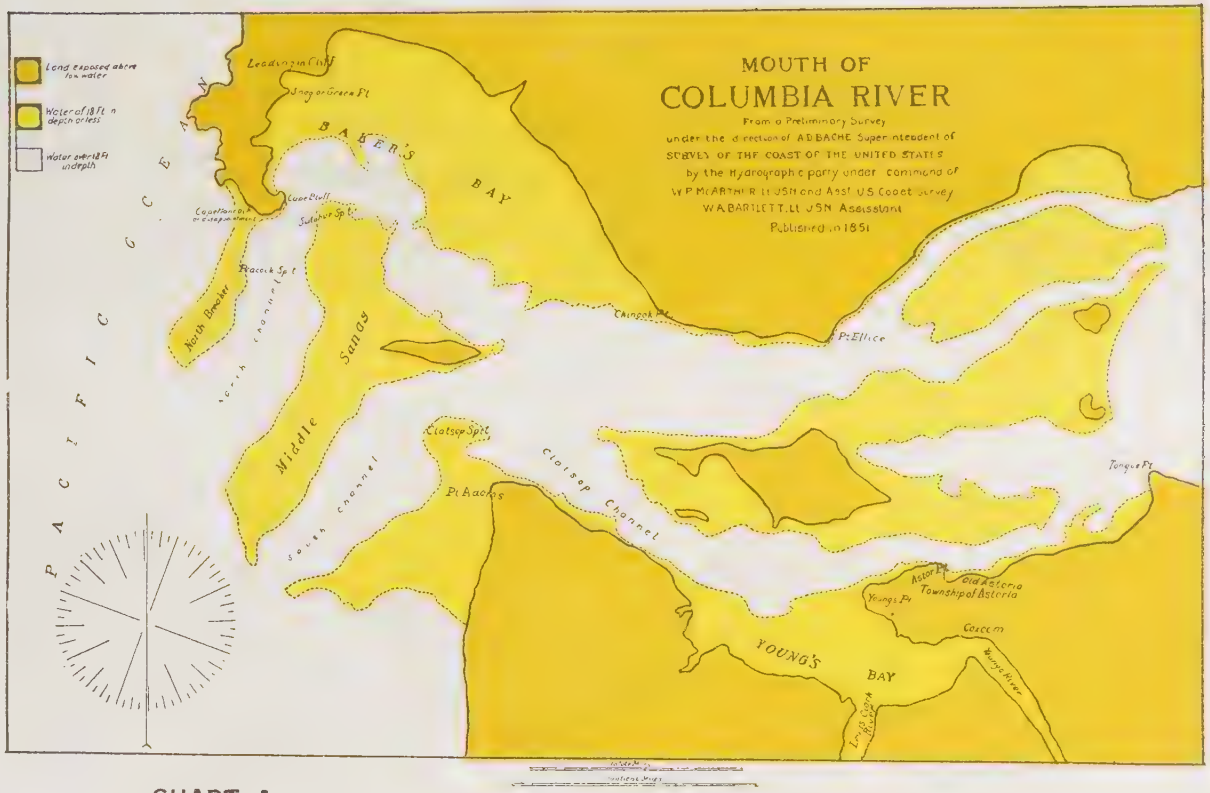

CHART A

OREGON

1851

Looking only at the description of the boundary in the act one might think that there were three channels, north, south and middle, but it is quite apparent, from the testimony that there were but the two. The meaning would be more clear if the language was "easterly to and up the middle of said channel," and that that was the intent of Congress is, we think, obvious; first, because there were only two channels; second, to locate a starting point on the west line in

the ocean opposite the middle of one channel and thence run the boundary up the middle of another channel would hardly be expected. If the middle of the northern channel was intended to be the dividing line between Oregon and the territory north, it would be natural to fix the point of starting in the ocean west of the center of that channel. Further, that the channel north of Sand Island was the one intended as the boundary between Oregon and the territory north of it is made more clear by this fact:

On October 21, 1864, Oregon passed an act granting to the United States—"all right and interest of the State of Oregon, in and to the land in front of Fort Stevens and Point Adams, situate in this State, and subject to overflow between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this State; the said island being subject to overflow between high and low tide.

SEC. 2. The Governor of this State shall cause two copies of this act to be prepared and certified under the seal of this State, and forward one of such copies to the Secretary of War of the United States, and the other of such copies to the commanding officer of this district of the military department of the Pacific Coast." Special Laws of Oregon, 1864, p. 72.

Now this act was passed shortly after the admission of Oregon and
*134 indicates the understanding both of the State of Oregon * and the United States that the boundary was through the channel north of Sand Island. It is a recognition of Oregon's title to that island and an acceptance by the United States of a grant from that State.

While all this is not in terms admitted by counsel for complainant, yet the burden of their principal contention impliedly does so, for they say:

"The proof will disclose the fact that there have been various channels in the Columbia River which have gradually, imperceptibly and continuously changed and shifted. There has been at no time such a change as to come within the definition of avulsion. The contention of the complainant is that the true boundary line is the varying center or middle of that channel of the river which is best constituted and ordinarily used for the purposes of navigation. . . . The line claimed by the defendant commences at a point which is alleged to have been the middle of the North Ship channel of the river as it existed in 1859 (the year in which Oregon was admitted into the Union), and follows certain channels supposed to exist in that year throughout the portion of the river in controversy."

In support of their contention counsel refer to: *Nebraska* v. *Iowa,* 143 U. S. 359; *Iowa* v. *Illinois,* 147 U. S. 1; *Louisiana* v. *Mississippi,* 202 U. S. 1. To these may be added *Missouri* v. *Nebraska,* 196 U. S. 23, 35.

But in these cases the boundary named was "the middle of the main channel of the river," or "the middle of the river," and it was upon such a description that it was held that in the absence of avulsion the boundary was the varying center of the channel. But there is no fixed rule making that the boundary between States bordering on a river. Thus, the grant of Virginia, of all right, title and claim which the said commonwealth had to the territory northwest of the River Ohio, was held to place the boundary on the north bank of the river. *Handly's Lessee* v. *Anthony,* 5 Wheat. 374, in which the subject is discussed by Mr. Chief Justice Marshall. See also *Howard* v. *Ingersoll,*
*135 13 How. 381. Now, if Congress in establishing the boundary * between Washington and Oregon had simply named the middle of the river, or the center of the channel, doubtless it would be ruled that the center of the main channel, varying as it might from year to year through the processes of accretion, was the boundary between the two States. That Congress had the propriety of such a boundary in mind is suggested by the terms of the act establishing the territorial government of Washington, passed March 2, 1853, c. 90, 10 Stat. 172, in which "the middle of the main channel of the Columbia River" was named as the boundary. However, as we have seen, when Congress came

to provide for the admission of Oregon (doubtless from being more accurately advised as to the condition of the channels of the Columbia River) it provided that the boundary should be the middle of the north channel. The courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel. That remains the boundary, although some other channel may in the course of time become so far superior as to be practically the only channel for vessels going in and out of the river. It is true the middle of the north ship channel may vary through the processes of accretion. It may narrow in width, may become more shallow, and yet the middle of that channel will remain the boundary. This is but enforcing the idea which controlled the decisions in the prior cases referred to, the difference springing out of the fact that here there were two instead of but one substantial channel. Aside from the fact that any other rule would be ignoring the action of the Government in prescribing the boundary—the intention in respect to which was in effect confirmed by the conveyance from Oregon to the United States of Sand Island and adjoining lands—there would be this practical difficulty. At the time of the admission of Oregon both the north and south channels were freely used. The depth of water in each was nearly the same, and the use of either channel depended largely upon the prevailing wind, so that it would be hard to say which was the most important, so surpassing in importance the
*136 other as to be properly called the main channel. * Concede that to-day, owing to the gradual changes through accretion, the north channel has become much less important, and seldom, if ever, used by vessels of the largest size, yet when did the condition of the two channels change so far as to justify transferring the boundary to the south channel, on the ground that it had become the main channel? When and upon what conditions could it be said that grants of land or of fishery rights made by the one State ceased to be valid because they had passed within the jurisdiction of the other? Has the United States lost title to Sand Island by reason of the change in the main channel? And if by accretion the north should again become the main channel, would the boundary revert to the center of that channel? In other words, does the boundary move from one channel to the other, according to which is, for the time being, the most important, the one most generally used?

These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the States bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter in the course of years becomes the most important and properly called the main channel of the river.

The testimony fails to show anything calling for consideration in respect to the last clause in the quotation from the boundary of Oregon. The channel is not divided by islands.

Our conclusion, therefore, is in favor of the State of Oregon, and that the boundary between the two States is the center of the north channel, changed only as it may be from time to time through the processes of accretion.

This is one of those cases in which the parties to the suit are alike interested, and, according to the usual rule, the costs will be divided equally between them.[1]

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[1] For the final phase of this case see *Washington* v. *Oregon* (214 U. S. 205), *post*, p. 1611.—Editor.

State of Missouri v. State of Kansas.

Supreme Court of the United States, 1908.

[213 *United States*, 78.]

The boundary line between Missouri and Kansas is and remains, notwithstanding its shifting position by erosion, the middle of the Missouri River from a point opposite the middle of the mouth of the Kansas or Kaw River.

The act of June 7, 1836, c. 86, 5 Stat. 34, altering the western boundary of Missouri, is to be construed in the light of extrinsic facts; and, as so construed, its object was not to add territory to the State but to substitute the Missouri River as a practical boundary, so far as possible, instead of an ideal line along a meridian.

The result of this decision is that an island in the Missouri River west of the centre of its main channel, as that channel now exists, belongs to Kansas, notwithstanding such island is east of the original boundary line of Missouri.

THE facts are stated in the opinion.

Mr. Elliott W. Major, Attorney General of the State of Missouri, and *Mr. Hunter M. Meriwether,* with whom *Mr. Henry M. Beardsley* was on the brief, for complainant:

There is no dispute as to the location of the western boundary of Missouri for the two and one-half or three miles north of the mouth of the Kansas River, prior to 1837. See constitution of Missouri of 1820. The west line of the State was therein laid down as a meridian line passing through the mouth of the Kansas River.

The maps in evidence show that in 1836–37 the Missouri River had moved to the east so far that the first two and one-half miles of the old west boundary line surveyed by Sullivan were in the river.

On March 28, 1837, the land lying between the old state boundary and
*79 the Missouri River was added to the State, and * no change was made in the boundary line except where land lay between the old state-line and the river. Act of June 7, 1836, c. 86, 5 Stat. 34. It is clear from this act that the boundary of the State was not changed except where there were lands lying between the old boundary and the Missouri River, in which case the boundary was *extended* to the river. Since, therefore, the old boundary line was already in the stream for the first two and one-half miles north of the mouth of the Kansas River, no lands were added there and no change of boundary there took place.

There is no evidence to support the contention that Missouri and Kansas have by a long course of conduct regarded the shifting channel of the Missouri River over these two and one-half miles as the border line between the States rather than the true north and south line. It requires the consent of the States and Congress to change a state boundary; so no change could be made without the concurrent action of all three sovereignties. But there is no evidence that the States have agreed upon any other than the true boundary. Kansas in framing her constitution made her east line in terms "the west line of the State of Missouri." Much stress was by Kansas at the hearing put upon the language of the several statutes of the State of Missouri giving the boundaries of the counties of Platte and Clay and Jackson in Missouri and of the State of Kansas giving boundaries of the counties of Wyandotte and Johnson in that State. The legislative acts can in no wise be regarded as attempts to define the boundaries of the State. Such boundaries could not be so defined. They, on

the other hand, give the boundaries of these counties with reference to the land as it at the time lay. The state line was in the Missouri River. There was no desire to take account, in fixing county boundaries, of land lying then within the river.

The determination of the true line as the western boundary of Missouri, at the point in question, depends entirely upon the construction of the terms of the act of June 7, 1836, extending western boundary to the Missouri River.
*80 Missouri, by * an amendment to its constitution, adopted the line thus established but it did not cede or waive its rights of soil and jurisdiction over any portion of its original territory. It is established by the proof that at the point in dispute the western boundary of the State was already in the Missouri River.

The rule is that where a power possesses a river and cedes the territory on the other side of it, making the river the boundary, that power retains the river, unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river. *Howard* v. *Ingersoll,* 13 Howard, 381.

If there was anything doubtful or indefinite in the language of the act of June 7, 1836, or in the line as established by it, the subsequent acts of the parties affected thereby as well as local conditions determine a proper construction of what was meant by the act, but the language, itself, is plain and no other assistance is needed. *Alabama* v. *Georgia,* 24 How. 505.

Mr. F. S. Jackson, Attorney General of the State of Kansas, *Mr. John S. Dawson* and *Mr. C. C. Coleman,* for defendant, submitted.

The act of 1836 extending the jurisdiction of the State of Missouri over the lands between said State and the Missouri River, and extending the western boundary of said State to the Missouri River, was an authoritative establishment of the boundary line of that State to the meridian line of the channel of the Missouri River from the mouth of the Kansas River north to the northern boundary of the State. See Memorial, General Assembly of Missouri, approved January 15, 1831; *St. Joseph R. R. Co.* v. *Devereux,* 41 Fed. Rep. 14.

The State of Missouri, having accepted such determination of its boundary and all of the officials and people of the State having acted in accordance therewith since 1836 until the present time, and her sister States of Kansas and Nebraska having also acted on such understanding, such boundary line of
*81 the State of Missouri became fixed on the thread of the * Missouri River channel at all points above the mouth of the Kansas River, and such boundary cannot now be questioned by the State of Missouri.

Where a river is declared to be the boundary between States, if such river suddenly change its course or desert the original channel as the result of a great flood or what is commonly known as an avulsion, the boundary between such States remains in the middle of the deserted river bed, but if the river change imperceptibly, from natural causes, the river as it runs continues to be the boundary between the two States. *Cooley* v. *Golden,* 52 Mo. App. Rep. 229; *Iowa* v. *Nebraska,* 143 U. S. 359.

Where a river is the boundary line between two States, the jurisdiction of said States is concurrent over the channel of the river to the meridian line of said channel, but where an island arises and exists on the bed of said river and the main channel of the river flows to one side only of the island, such island is within the jurisdiction of the State nearest to which it is located. *McBaine* v. *Johnson,* 155 Missouri, 203; *East Omaha Land Co.* v. *Hanson,* 117 Iowa, 97; *S. C.,* 90 N. W. Rep. 706; *De Long* v. *Olsan,* 63 Nebraska, 331; *S. C.,* 88 N. W. Rep. 514.

Mr Justice Holmes delivered the opinion of the court.

This is a bill to establish the western boundary of the State of Missouri for a short distance above Kansas City in that State. The object of Missouri is to maintain title to an island of about four hundred acres in the Missouri River, now lying close to Kansas City, Missouri, and Kansas City, Kansas. The State of Kansas claims the same island by answer and what it terms a crossbill. A few words will explain the issue between the parties. When Missouri was admitted to the Union its western boundary at this point was a meridian running due north. There was land between a part of this line and the Missouri
*82 River. By treaty with the Indians and act * of Congress on the petition of Missouri, that State was granted jurisdiction over such land and its boundary was extended to the Missouri River. Since that time the river has been moving eastward by gradual erosion, and at the place in controversy has passed to the east of the original line. The land in question lies to the east of the line and the claim of Missouri is that, whatever the change in the river, its jurisdiction remains to that line.

Missouri fortifies its claim by an allegation that the line at the place in controversy never was changed. According to the bill, the line as surveyed began at a point on the left bank of the Missouri River, opposite the mouth of the Kansas or Kaw, for two miles and a half "practically conformed with the left bank of the Missouri," and by the shifting of the stream was in the river when the act of Congress was passed, so that there was no land to be added there, and the original boundary remained. Kansas denies that the original line conformed to the left bank of the river, and says that even if Missouri is right with regard to the facts, the result of the change was to make the Missouri River the boundary between the States from the north to the point where the Missouri and the Kansas meet.

To decide the case it is necessary to construe the laws by which the boundary of Missouri was changed. The first step to that end was a memorial of the General Assembly of Missouri to Congress, dated January 15, 1831. The sum of it is this. Many inconveniences have arisen from the improvident manner in which parts of the boundaries have been designated. When the state government was formed the whole country on the west and north was a wilderness and its geography unwritten. The precise position of that part of the line passing through the middle of the mouth of the Kansas River, which lies north of the Missouri, is unknown, but it is believed to run almost parallel with the course of the stream, so as to leave a narrow strip of land varying in breadth from fifteen to thirty miles. Great calamities are to be feared from the Indians
*83 on * the frontier. Therefore it is necessary to interpose, "whenever it is possible, some visible boundary and natural barrier between the Indians and the whites." The Missouri River will afford this barrier "by extending the north boundary of this State in a straight line westward, until it strikes the Missouri, so as to include within this State the small district of country between that line and the river." There is more, but the main point of the memorial is to secure a natural barrier between Indians and whites, and, in addition, easier access to "the only great road to market." A few square miles, more or less, of savage territory were of no account, but the object was to get the river for a bound.

There was a report to the Senate on April 8, 1834, which adopted the foregoing reasons, and recommended making the Missouri River "the western boundary to the mouth of the Kansas River." Senate Doc. No. 263, 23d Cong. 1st Sess. On February 12, 1836, there was a report to the House of Representatives on the same subject. It referred to a bill that had been reported, authorizing the President to run the boundary line, and mentioned that the bill had been amended by directing the line to be run from the mouth of the Kansas River up the Missouri River, etc. It stated that the Indian title to the lands in question might be extinguished and ought to be, because those lands ought to form part of the State of Missouri. As a reason it mentioned that when Missouri was admitted into the Union it was expected that other States would be formed on the west, in which case the use of the Missouri would have been equally convenient, whether it was the border line or not; since then, however, the Indians had been located on the frontier, thus hampering access to the river. As a final argument it added that to make the river the boundary would be for the advantage of both the Indians and the whites. In conclusion, "to carry into effect the ultimate object of the resolution," it reported "A Bill to extend the western boundary of the State of Missouri to the Missouri River." H. R. No. 379, 24th Cong. 1st Sess. This bill was passed, and became the act of Congress
*84 * on which this controversy turns. It provides that "when the Indian title to all the lands lying between the State of Missouri and the Missouri River shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the State of Missouri, and the western boundary of said State shall be then extended to the Missouri River." These are the only material words. Act of June 7, 1836, c. 86, 5 Stat. 34.

In anticipation of the action of Congress the constitution of Missouri was amended as follows: "That the boundary of the State be so altered and extended as to include all that tract of land lying on the north side of the Missouri River, and west of the present boundary of this State, so that the same shall be bounded on the south by the middle of the main channel of the Missouri River, and on the north by the present northern boundary line of the State, as established by the Constitution, when the same is continued in a right line to the west, or to include so much of said tract of land as Congress may assent." Amendment ratified at the Session of 1834-5, Article II, § 4. Mo. Rev. Sts. 1856, p. 91. Then, on December 16, 1836, the State assented to the act of Congress by "An Act to express the assent of the State of Missouri to the extension of the western boundary line of the State." Laws 1st Sess. 9th Genl. Assembly, p. 28; and, on January 17, 1837, a copy was transmitted to Congress by the President. Meantime, on September 17, 1836, a treaty was made with the Indians, in which they expressed their belief in the advantage of a natural boundary between them and the whites and released their claims. Indian Affairs. Laws and Treaties. Compiled by Kappler, 1904, p. 468. On March 28, 1837, the President, by proclamation, declared that the Indian title to lands had been extinguished, in pursuance of the condition in the act of Congress, and the act went into full effect. 5 Stats. 802. Appendix No. 1.

Whatever might be the interpretation of the act taken by itself and applied between two long settled communities, we think that the circumstances and the history of the steps that led to it show that the object throughout was that

*85 expressed * by the memorial; as we have said, not to gain some square miles of wilderness, but to substitute the Missouri River for an ideal line as the western boundary of the State, so far as possible, that is from the northern boundary to the mouth of the Kaw. That this was understood by Missouri to be the effect of the act is shown by a succession of statutes declaring the boundaries of the river counties in this part. They all adopted the middle of the main channel of the river; beginning with the act that organized the county of Platte, approved December 31, 1838, Mo. Laws, 1838, pp. 23-25, and going on through the Revised Statutes of 1855, p. 459, § 12 (Clay), p. 466 § 33 (Platte), p. 478, § 65 (Jackson), etc., to 2 Revised Statutes, 1879, ch. 94, §§ 5177, 5198 & 5237. The construction is contemporaneous and long continued, and we regard it as clear. It is confirmed by the cases of *Cooley* v. *Golden,* 52 Mo. App. 229, and *St. Joseph & G. I. R. Co.* v. *Devereux,* 41 Fed. Rep. 14, both of which cases notice that the act extended the boundary to the river, and not merely to the bank.

It follows upon our interpretation that it is unnecessary to consider the evidence as to precisely where the line as surveyed ran from opposite the mouth of the Kansas or Kaw. If the understanding both of the United States and the State had not been a wholesale adoption of the river as a boundary, without any niceties, still, as the cession "to the river" extended to the center of the stream, it might be argued that even on Missouri's evidence there probably was a strip ceded at the place in dispute. But from the view that we take such refinements are out of place. The act has to be read with reference to extrinsic facts because it fixes no limits except by implication. We are of opinion that the limit implied is a point in the middle of the Missouri opposite the middle of the mouth of the Kaw.

Decree for the defendant.

State of Washington v. State of Oregon.

Supreme Court of the United States, 1909.

[214 *United States,* 205.]

Washington v. *Oregon,* 211 U. S. 127, reaffirmed on rehearing.

Although the volume of water and depth of a channel have constantly diminished, if it all results from process of accretion, or, as in this case, probably from jetties constructed by governmental authority, that channel still remains the boundary line, the precise line of separation being the varying center thereof.

The settlement of boundaries is generally attended with difficulties and it is wise for adjacent States to adjust their boundaries by boundary commissions and agreements as has been done with the consent of Congress in several instances.

THE facts, which involve the boundary between the States of Washington and Oregon as the same was determined by this court in this action, 211 U. S. 127, are as stated in the opinion.

The State of Washington filed a petition for a rehearing herein, upon the following points:

I. The court erred in finding and holding that the present ship channel at the entrance to the Columbia River was the old south channel.

II. The court erred in finding and holding that the former north channel still subsisted to the northward of Sand Island, and that the boundary between the States of Washington and Oregon was to the northward of said Sand Island.

III. The court erred in not finding and holding that the present single channel at the entrance to the mouth of the Columbia River was as much the former north channel of the entrance to said river as it was the former south channel, and in not giving effect as a matter of law to the said combined single channel as the boundary between the two States.

*206 IV. The court erred in finding and holding that the Columbia * River inside the entrance was not divided by islands and in finding and holding that the testimony failed to show anything calling for consideration in respect to the ownership of the said islands.

Mr. George Turner, Mr. E. C. Macdonald, Mr. W. P. Bell, Attorney General of the State of Washington, and *Mr. S. H. Piles,* for complainant, in support of the petition for rehearing:

Complainant in its petition for rehearing accepts the decision of this court to the effect that the north ship channel of the Columbia River is the channel fixed by the act of Congress as the north boundary of the State of Oregon, but with all deference, begs leave to present some considerations which make against the correctness of that decision, in the hope that the court may see fit to reverse it.

It is necessary, in discussing the subject, to determine the initial starting point of the Oregon line. According to the Oregon enabling act that point must be "due west and opposite the middle of the north ship channel of the Columbia River." Does this language mean due west of that channel at a point where the channel's flow crosses a line drawn from Point Adams to Cape Disappointment, which is assumed to be the mouth of the river, or does it mean due west and opposite that channel at its mouth or sea end? Oregon claims the former, and Washington claims the latter.

The sea end of the north channel in 1851 and 1854 was within three miles of the mouth of the Columbia River. See abstract, U. S. Coast Survey Charts, 1851 and 1854; Record, p. 68. It was then within territorial waters, and if that channel was to be employed through any part of its course as a boundary between Oregon and the prospective State of Washington to the north, it was as important that it be thus employed from its sea to its entrance into the river proper, as it was that it be employed inside the entrance. The same local territorial jurisdiction, with some unimportant qualifications, would exist

*207 over it out to the three mile limit as would exist * over it within the river banks, and the same policy which would make the channel inside the river banks the boundary would require the channel to be continued as the boundary out to its sea end. This seems clear. *Iowa* v. *Illinois,* 147 U. S. 1, 13, holding that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river.

The only permissible construction of the law is, that the line commences due west and opposite the middle of the north ship channel at its sea end, and that it extends thence easterly to the middle channel of the river inside the mouth of the river. Such a line would divide the river mouth almost equally between

Oregon and Washington and give each of them, in 1859, an equally good ship channel into the river, considerations which it may be presumed would have moved Congress. See Chart A, 211 U. S. 133. The designation of such a line would also provide an explicable rule for continuing the dividing line up the river to Fort Walla Walla. The term, "middle channel," as used in the law, is not materially different in meaning from the term, "mid-channel," which latter term we are told by Mr. Justice Field in *Iowa* v. *Illinois, supra,* is used interchangeably in international law with the term "middle of the river," "middle of the main channel, "the deepest channel of the river," etc. The line we contend for, starting from the point we contend for, would not strike or follow any channel until it reached the mouth of the river proper, but would cut across the middle sands, which is an objection to it; but it is not more objectionable in that respect than the line contended for by Oregon, starting from the point it contends for, which, likewise, does not follow any channel until it reaches the mouth of the river and which cuts across Peacock Spit in order to reach that point. Considerations of reason and propriety, addressing themselves to Congress, would all move the adoption of a line such as that we now contend for rather than on the Oregon line, and we may add that the language of the law as
*208 actually passed by Congress agrees with that line in * every particular and cannot be made to agree with the Oregon line in any particular.

If the north channel is the channel contemplated by the law as the boundary, then the north ship channel inside the river, that is, the channel to the north and east of Sand Island, ceased to exist about the year 1881, or sooner; the volume of water formerly passing through that channel and constituting it, cut a new channel for itself through the middle sands south of Sand Island, and this new channel then became in fact, as well as in law, the north channel of the river. See Report of Board of Engineers for the Permanent Improvement of the Mouth of the Columbia River, October 13, 1882. Record, pp. 23, 24, 28, 29. Report of Board of Engineers on Project for Improvement of Mouth of Columbia River, dated January 24, 1903. Record, pp. 53, 54.

In the rule of law applicable to such a change in the position of a navigable channel constituting a boundary between States, there is no room for the application of the doctrine of avulsion. That doctrine applies only where the entire stream seeks a new bed. It has no application to changing channels within the original banks of the stream.

The true rule is that the middle thread of the channel must be followed wherever the channel may have shifted within the banks of the stream *Nebraska* v. *Iowa,* 143 U. S. 359; *Iowa* v. *Illinois,* 147 U. S. 1; *Missouri* v. *Nebraska,* 196 U. S. 23; *Louisiana* v. *Mississippi,* 202 U. S. 1. It is also the rule of international law. See statement of Dr. Twiss, quoted in *Iowa* v. *Illinois,* 147 U. S. 1, 9.

The stretch of river involving all the islands and sands in controversy excepting Sand Island, extends from the mouth of the river eastward up to Three Tree Point, a distance of approximately twenty-five miles. There are only two islands in the entire lot (Desdemona Sands and Snag Island), the remainder being entirely submerged and only visible at low tide.
*209 In determining the controversy as to these islands and sands * up the river it will be necessary to take up and construe portions of the act of 1859 not before considered by this court.

The language of the act now to be considered is as follows: "Thence easterly to and up the middle channel of said river, and where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla."

It cannot be supposed that there are three channels extending from the mouth of the river to Fort Walla Walla. Therefore the words "middle channel" cannot be given their literal meaning. It cannot be supposed that the north channel at the mouth of the river extends as far as Fort Walla Walla. Therefore, that channel, even if the court adheres to its former decision that that channel is the one by which the line enters the mouth of the river, cannot be the dividing line east of Sand Island. The meaning of the words "middle channel" must be the same as "mid-channel" or the middle of the main navigable channel of the river. But the phraseology changes when the law comes to deal with stretches of the river which are divided by islands. Then the language is, "up the middle of the widest channel thereof." Even here there must be a channel, so that the law does not mean the widest expanse of water between shore and island. There must also be islands in the true sense, which means bodies of land surrounded by water and above water at all times; so that there is no room for the application of the term "widest channel" except where there are such islands.

The middle of the widest channel of the river may well be construed to mean the middle of the best channel of the river. Congress would not adopt the main navigable channel of the river as the boundary between the two States throughout most of its course, and adopt a different rule for stretches of the river which are divided by islands. While in the law the term "middle channel" and "widest channel" appear to be used in opposition to each other and to mean different things, this opposition would be lessened by the interpola-
*210 tion of the words "of the" between the words "middle" and "channel" * so as to make the law read, "up the middle of the channel," and this is permissible, because it is evidently what the lawmakers meant.

As to the channel south of Desdemona Sands, shown on Washington exhibit "H," there never has been a time from 1859 down to the present day, when that channel has not been the main channel of the river at that point, the channel which commerce has followed. Both Jussen and Hegardt, accomplished engineers, prepared test maps which were accurate reproductions of the several maps issued by the Government, commencing with that of 1851, and according to those maps, their hydrography, topography, sailing directions, and aids to navigation marked thereon, such as beacons and buoys, the main navigable channel of the river inside the entrance of the river was now and always had been the line in red and marked in green on Washington's exhibit "H," "Channel line, 1851." This line ran to the south of Desdemona Sands. On the question of the continuance of the old north channel up along the north bank of the river, both of them testified that while there was deep water along the north bank as far up as Knappton, it dissipated itself in shoals and shallows immediately above that point, and that there never had been a channel, for ocean-going vessels, along the north bank above Knappton. And further that the said middle channel was not now and had never been of sufficient depth to admit the passage of ocean-going vessels and had never been so used.

With reference to the last stretch of the river, the evidence is that from the earliest times until about 1869, the 1859, or Woody Island channel, was the only channel used for deep draft ocean-going vessels and that the better channel of the present day, was only obtained as the result of extensive dredging. The old Woody Island channel is the true boundary between the two States. It was so in 1859 and remained so until 1869. The action of the public authorities in diverting that channel cannot be permitted to have the effect of diverting
*211 the boundary line. Congress could not do that by enactment, * and what

Congress cannot do directly a mere engineer officer cannot do indirectly. If this position be sound, then Snag Island is on the Washington side of the line and belongs to Washington. The same thing is true of most of the submerged sands in controversy, although their location is not sufficiently fixed by the evidence, with reference to the line, to enable us to identify them accurately. However, that does not seem material at this time. If the rehearing be granted and Washington's contention as to the true line be then established, the practice is that this court, on proper application, will order a survey to identify and fix, with reference to the line, all disputed points.

Mr. A. M. Crawford, Attorney General of the State of Oregon, *Mr. I. H. Van Winkle, Mr. Harrison Allen, Mr. C. W. Fulton* and *Mr. A. M. Smith,* for defendant *contra* the petition for rehearing:

Petitioner contends that "when the north channel has been closed and the waters diverted elsewhere, one or two results follow as a matter of law. The waters which flowed through that channel, which created and constituted it, must be followed wherever they may have been diverted within the banks of the river, and still must be treated as the north ship channel; or the north ship channel must be treated as having ceased to exist, and on the doctrine of avulsion, the boundary between Oregon and Washington must be established on the line which that channel followed in 1859."

In the case at bar, Congress, in the Oregon enabling act, 1859, fixed the boundary between the States, parties to this suit, at the point in controversy, in the middle of the north ship channel. The United States and the State of Oregon were the only sovereignties having any interest in the matter at that date, and the said act of Congress is just as binding on States formed out of territory then owned by the Federal Government, as the agreement between Kentucky and Missouri. Construed in *Missouri* v. *Kentucky,* 11 Wall. 395. In
*212 * that case this court held that if the river had subsequently turned its course, the status of the parties was not altered by it, for the channel which the river abandoned remained the boundary between the States and the island in controversy did not, in consequence of this action of the water, change its owner.

Again in the case at bar the testimony shows beyond question that Sand Island was in the territorial limits of Oregon when the State was admitted into the Union. Washington not only is bound by the Oregon enabling act of 1859, but by her legal representatives, and agents, she agreed that the boundary at the point in dispute was in the north channel, and that such agreement was ratified by the vote of the people in adopting her constitution. This being so, if the north ship channel had, as petitioner contends, so shoaled in 1889, that ocean-going vessels could neither enter nor depart from the river through it, then Washington practically agreed to the boundary being north of Sand Island, after the north channel had ceased to be a ship channel as far as large ships, or even those of moderate size, are concerned.

While in early times it may be doubtful whether Sand Island was above high water at all seasons of the year, it cannot be questioned that it has been almost continually occupied by people actually living thereon for some time prior to the admission of Washington to the present time.

The construction of a jetty changing the course of a channel should not change the boundary between States, and take an island out of one sovereignty and place it in another, when the natural washing away of the banks of a stream will not have that effect. See *Base* v. *Russell,* 86 Missouri, 209; *Nebraska* v. *Iowa,* 143 U. S. 359.

Relative to the second proposition in the petition for rehearing, there are no islands shown to exist in or near the north channel of the Columbia River, after Sand Island is passed, within that portion of the river involved in this controversy. There are sand bars in or near the south channel, and a few
*213 in * or near the north channel, partially bare at low water, but nothing coming within the definition of an island as the term is usually understood.

In discussing the meaning of the clause of that portion of § 1 of the Oregon enabling act, defining the boundary, reading as follows: "Thence easterly, to and up the middle channel of said river, and, where it is divided by islands up the middle of the widest channel thereof," etc., petitioner evidently attempts to show that the widest channel is south of Sand Island, on the theory that the act means the widest deep water, but such is not the true construction of the language employed. If the line starts as the decision herein holds, in the north channel, then it remains there, in the middle of said channel until we arrive at some point where the same is divided by islands, then up the widest channel, even if up the widest deep channel as petitioner urges, it does not bring its case within the rule it invokes. South of Sand Island, the ruling depth is not to exceed fourteen or fifteen feet, while north it is much more, and the width several times greater.

Petitioner insists that the court misconceived the facts, but does not controvert the propositions of law announced by the court in its opinion herein. The physical facts relative to Sand Island, heretofore referred to, render impossible the application of any other rule than that of the Kentucky-Missouri case, and the facts relative to Snag Island, its location, the main ship channel always having been near the north shore, the same being the north ship channel, called for in the enabling act of Oregon, and the constitution of Washington, and it being the widest channel as well as the north ship channel, and the further fact that since long prior to the admission of Washington, no attempt has been made to use the so-called Woody Island channel, but that the same was abandoned in 1881 or 1882, and that large vessels never used the same, considered with the history and surrounding circumstances preclude all suggestion of a misconception of the facts by the court, and no rehearing should be granted.

*214 * Mr. Justice Brewer delivered the opinion of the court

This case was decided on November 16, 1908, substantially in favor of the State of Oregon. 211 U. S. 127. On February 17 of this year a petition for rehearing was presented by the State of Washington. On examination of that petition we entered an order directing that the parties have leave to file briefs upon the questions. They have done so, and we have reëxamined the case with great care.

There are practically two matters presented; one, whether the boundary near the mouth of the Columbia River was and is the channel north of Sand Island. We held that it was, and with that conclusion we are still satisfied. It is unnecessary to restate the reasons therefor. We may, however, refer to *Missouri* v. *Kentucky,* 11 Wall. 395, as much in point. That was a controversy between those two States as to the title of Wolf Island. The treaty between France, Spain and England in February, 1763, stipulated that the middle of the Mississippi should be the boundary between the British and French territories on the continent of North America. This was recognized by the treaty of peace with Great Britain in 1783, and different treaties since then. The boundaries of

Missouri when she was admitted into the Union as a State in 1820 were fixed on this basis. Kentucky had succeeded in 1792 to the right and possession of Virginia, which, by virtue of the treaties referred to, extended to the middle of the bed of the Mississippi. The main channel of the Mississippi had been up to at least 1820 west of the island. There was testimony that since then it had changed to the east side. Nevertheless the court held that the island remained still a part of Kentucky, saying (p. 401):

"It follows, therefore, that if Wolf Island in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this
*215 controversy is not altered by it, for the channel which the * river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner."

So whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel. *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178; *Nebraska* v. *Iowa,* 143 U. S. 359; *Iowa* v. *Illinois,* 147 U. S. 1; *Missouri* v. *Nebraska,* 196 U. S. 23; *Louisiana* v. *Mississippi,* 202 U. S. 1.

The other question arises in this way. The act admitting Oregon, after naming as the commencement of the boundary "a point due west and opposite the middle of the north ship channel of the Columbia River," adds "thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof to a point near Fort Walla Walla." With reference to this we said: "The testimony fails to show anything calling for consideration in respect to the last clause in the quotation from the boundary of Oregon. The channel is not divided by islands." Now, it is alleged that there is set forth in the bill of complaint and admitted in the answer that a controversy has arisen as to the boundary lines, and that both of said States claim and assume to exercise jurisdiction over numerous islands and sands in said Columbia River, sixteen of which are enumerated by name.

While sixteen islands and sands are mentioned, yet in the brief filed by the plaintiff on the application for a rehearing it is stated that, outside of Sand Island, the title to which is, as shown in the former opinion settled by the decision of the first question, only two, Desdemona Sands and Snag Island, can be called islands, the remainder being entirely submerged and only visible at low tide. These two, therefore, are all that can come within the definition in the boundary.
*216 * That speaks of "the middle channel of said river," and counsel contend that there is no pretense of three channels, and therefore the language should properly be construed as the middle of the main channel of said river, and we are inclined to think that that is the true construction. But it must be remembered that the boundary in the first instance passes around the north of Sand Island, in what was known as the north channel, and it does not strike any channel which deserves to be called the main channel until it has passed to the eastward of Sand Island. While the testimony is not satisfactory as to the point, at the time

of the admission of the State of Oregon, at which this north channel, after passing Sand Island, touched any other channel, we are of the opinion that it must have been at a point east and north of Desdemona Sands. Of course, in considering this matter we assume that the contention of the State of Washington is correct, that Desdemona Sands could have then properly been termed an island.

With reference to Snag Island, the question is a difficult one. We agree with counsel that the term "widest channel" does not mean the broadest expanse of water. There must be in the first instance a channel—that is, a flow of water deep enough to be used and in fact used by vessels in passing up and down the river; but it does not mean the deepest channel but simply the widest expanse of water which can reasonably be called a channel. Now, close to Snag Island there appear several channels, the principal ones being Woody Island channel and Cordell channel, both used at different times by vessels navigating the river. The Cordell channel runs to the north of Snag Island, the Woody channel to the south, while the boundary claimed by the State of Oregon runs in a channel far to the north of both Woody Island and Cordell channels.

Further, it appears that in December, 1877, the State of Oregon conveyed Snag Island, in consideration of the sum of $143.75, to J. W. and V. Cook.

*217 While of course this is not conclusive, yet taken in connection with the fact that the * State of Washington has never attempted to interfere with the jurisdiction of the State of Oregon over Snag Island, and the doubt that hangs about the position and depth and width of the various channels in the vicinity at the time of the admission of the State of Oregon, we hold that that island is within its territorial limits.

It must be borne in mind that an inquiry of this kind is attended with much difficulty. Here is a river of great width, three miles or so at certain places, whose bed is largely of sand, and whose channels have been naturally affected by the flow of the water, and also of late years by the jetties constructed by the Government in order to facilitate navigation. Congress, evidently recognizing the difficulty which attended the location of the exact boundaries, provided that the States of Washington and Oregon should have concurrent "jurisdiction in civil and criminal cases upon the Columbia River." Yet this provision does not determine the boundaries between the two States, and has proved insufficient to settle the disputes between them as to things done upon the Columbia River. *Nielsen* v. *Oregon,* 212 U. S. 315.

We may be pardoned if, in closing this opinion, we refer to the following:

"Joint Resolution to enable the States of Mississippi and Arkansas to agree upon a boundary line and to determine the jurisdiction of crimes committed on the Mississippi River and adjacent territory.

'Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the

*218 other such * tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Mississippi River.

"Approved January 6, 1909."

Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction.

The petition for rehearing is

Denied.

State of Maryland v. State of West Virginia.

Supreme Court of the United States, 1910.

[217 *United States,* 1.]

The record in this case sustains the proposition that for many years the people of Maryland, Virginia and West Virginia, have accepted as the boundary between Maryland and West Virginia the line known as the Deakins line, and have consistently adhered to the Fairfax Stone as the starting point of such line, and that none of the steps taken to delimitate the boundary since such line was run in 1788 have been effectual, or such as to disturb the continued possession of people claiming rights up to such Deakins line on the Virginia and West Virginia side.

Whether long continued possession by a State of territory has ripened into sovereignty thereover which should be recognized by other States depends upon the facts in individual cases as they arise.

Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals.

Even if a meridian boundary line is not astronomically correct, it should not be overthrown after it has been recognized for many years and become the basis for public and private rights of property.

*2 The decree in this case should provide for the appointment of commissioners * to run and permanently mark, as the boundary line between Maryland and West Virginia, the old Deakins line, beginning at a point where the north and south line from the Fairfax Stone crosses the Potomac River and running thence northerly along said line to the Pennsylvania border.

West Virginia is not entitled to the Potomac River to the north bank thereof. *Morris* v. *United States,* 174 U. S. 196.

Boundary disputes between States should be adjusted according to the facts in the case by the applicable principles of law and equity, and in such manner as will least disturb private rights and titles regarded as settled by the people most affected; and it should be the manifest duty of the lawmaking bodies of adjoining States to confirm such private rights in accordance with such principles.

THE facts, which involve that portion of the boundary line between the two States lying between Garrett County, Maryland, and Preston County, West Virginia, are stated in the opinion.

Mr. Isaac Lobe Straus, Attorney General of the State of Maryland, and *Mr. Edward H. Sincell,* with whom *Mr. William L. Rawls* was on the brief, for the plaintiff:

The charter of Maryland gave to the Lord Proprietary an absolute right of soil in and to all the territory comprehended within its specified boundaries. *Cunningham* v. *Browning,* 1 Bland Ch. Rep. 305; *Cassell* v. *Carroll,* 2 Bland Ch. Rep. 127; *Baltimore* v. *McKim,* 3 Bland Ch. Rep. 455; *Briscoe* v. *State,* 68 Maryland, 294; *Wharton* v. *Wise,* 153 U. S. 155; *Morris* v. *United States,* 174 U. S. 196.

The State of Maryland at and by the Revolution acquired all the territorial rights vested in the Proprietary before the Revolution. Cases *supra; Ringgold* v. *Malott,* 1 H. & J. 299; *Howard* v. *Moale,* 2 H. & J. 249; *Matthews* v. *Ward,* 10 G. & J. 443; *Smith* v. *Deveemon,* 30 Maryland, 374; *United States* v. *Morris,* 23 Wash. Law Rep. 759.

The State of Maryland stands upon the calls in the charter to Lord Baltimore as paramount, controlling and final in delimiting and fixing her western and southern boundaries.

*3 * The construction of this grant of territory in the charter of Maryland has been judicially settled. The courts and all other authorities have again and again declared that the charter defines the western and southern boundaries of the former province and present State of Maryland as having a common terminus at the first fountain of the Potomac River—that is to say, that the western boundary is the meridian running from the Pennsylvania line due south to the first fountain of the Potomac River, and that the southwestern and southern boundary begins at the said first fountain on the farther or southern bank or shore, and from that point runs along said farther or southern shore or bank of the river to its mouth—the southern shore or bank of the river, from its source to its mouth, being the boundary in Maryland on its southern and southwestern sides, and the whole of the river and its bed, from its source to its mouth, being within the boundaries of the State.

Every court, every jurist and every author who has ever mentioned the subject at all, unite, concur and agree in this construction and view of the boundaries called for by the charter, and not a single dissent from this construction can be found anywhere except the claim put forth for the first time in this case that the western boundary of Maryland does not run to the western source or first fountain of the Potomac, but is located on the main body of the stream, two miles (10,321.1 feet) eastward from its most western spring or source, and almost a mile (4,020 feet) distant from the spring which the defendant contends is the first spring called for by the charter.

The State of Maryland submits that it has always been understood and declared, never denied or doubted and repeatedly and uniformly adjudicated that the southern and southwestern boundaries of Maryland extend along the southern shore of the Potomac River from its mouth throughout its whole extent to its first fountain or source. In other words, the meridian which the charter

*4 calls for as its western * boundary, which is located at the first fountain of the river, runs from the Pennsylvania line to the first fountain of the river and that, accordingly, the southwestern and the southern boundaries of the State extend from the point of the meridian at its first fountain upon the southern bank of the stream at its first fountain all the way to the mouth of the stream at the

Chesapeake Bay. Every court and every other authority which has had occasion to consider this subject has so construed this charter. And this is the only construction which is consonant with the manifest intention of the grant and with the rule of interpreting such grants as laid down by the foremost publicists and jurists. Cases *supra* and *Chapman* v. *Hoskins,* 2 Md. Chanc. 485; *Alexandria Canal Co.* v. *District of Columbia,* 9 Wash. Law Rep. 456; 1 Story's Comm., § 103; *O'Neal* v. *Virginia Bridge Co.,* 18 Maryland, 1, 16, and see Mr. Alvey's argument in *Doddridge* v. *Thompson,* 9 Wheat. 469; *Howard* v. *Ingersoll,* 13 How. 416, 424, 425; Vattel's Law of Nations, bk. 1, ch. 22, par. 5; 1 Bancroft's Hist. of U. S., ch. 7, 241; McMahon's Hist. of Maryland, 49, 51, 69; McSherry's Hist. of Maryland; Prof. Wm. H. Browne's "Maryland: The History of a Palatinate," 18; 1 Scharf's Hist. of Maryland, 409; *United States* v. *Texas,* 162 U. S. 1; *Uhl* v. *Reynolds,* 23 Ky. Law Rep. 759; 30 Am. and Eng. Ency. of Law, title "Waters and Watercourses," sub-title "Source," 351; Gould on Waters, § 41; *Wright* v. *Brown,* 1 Simon and St. 203; 2 Farnham on Waters and Watercourses, § 501, p. 1656.

In Professor Steiner's "Institutions and Civil Government of Maryland" (Ginn & Co., 1899), p. 2, the southern and western boundaries of Maryland are described as from the mouth of the Potomac, "along the south bank of that river to the source of its north branch; on the west the meridian of the source."

Where a watercourse has its source in a spring, such source is itself a part of the watercourse. 30 Am. and Eng. Ency. of Law, title "Waters and
*5 Watercourses," sub-title * "Source," pp. 351, 352; *Dudden* v. *Guardians of the Poor,* 1 H. & N. 627; *Tate* v. *Parrish,* 7 T. B. Mon. (Ky.) 325; *Colrick* v. *Swinburne,* 105 N. Y. 503; *Fleming* v. *Davis,* 37 Texas, 173; *Arnold* v. *Foot,* 12 Wend. 330; *Evans* v. *Merriweather,* 3 Scammon (Ill.), 495.

Where a natural monument is called for on a description of the boundaries of land, the identification of land, the identification of the object intended by the description is to be determined by a fair and reasonable construction of the whole instrument, regard being had in all cases to the true intent of the parties as expressed therein. 5 Cyc., "Boundaries," 869; *Horne* v. *Smith,* 159 U. S. 40; *Reynolds* v. *McArthur,* 2 Pet. 417; *Handley's Lessee* v. *Anthony,* 5 Wheat. 377; *Meredith* v. *Pielert,* 9 Wheat. 573; 8 Century Digest, title "Boundaries," 43.

The court must place itself as nearly as possible in the situation of the contracting parties at the time the deed was made in order to ascertain their intent. 4 Am. and Eng. Ency. of Law, title "Boundaries," 796.

The State of Maryland stands upon the calls in her charter to Lord Baltimore as paramount, controlling and final in delimiting and fixing her western and southern boundaries.

"Fairfax Stone" does not stand at the first fountain of the Potomac River. This was unequivocally approved in *Morris* v. *United States,* 174 U. S. 225.

The location of the Fairfax Stone as the first fountain of the Potomac River is against the plain provisions of the charter to Lord Baltimore, and defeats its calls for the western and southern boundaries of Maryland.

Potomac Spring is the first fountain of the Potomac River. The first fountain of a stream is the point or source in which the water first comes to the surface. Cases *supra* and *Colrick* v. *Swinburne,* 105 N. Y. 503.

It is absolutely undisputed in this case, that Potomac Spring is the point at which the water first comes to the surface and begins to flow in a regular
*6 channel, and that * Potomac Spring rises farthest to the northwest of all the waters of Potomac River.

Every physical, geographical and topographical feature of the region surrounding the head-waters of the Potomac River unmistakably and unquestion-

ably stamp Potomac Spring as the first fountain of the Potomac River, and a meridian line run through that spring fully and precisely satisfies and strictly conforms to every call for the initial point in the western and southern boundaries of Maryland contained in its charter.

Potomac River heading at Potomac Spring at once assumes a definite southeast course—the prevailing course of the river—with regular banks, while Fairfax Run runs directly opposite the course of the river, first flows nearly due west, thence northwest and thence northeast and east to the point of its confluence with the main body of the river shown at Station 31 on the plat.

Potomac Spring is perennial in its flow, while the springs in the vicinity of Fairfax Stone are only wet-weather springs, and have often been found entirely dry.

The waters from Potomac Spring emanate and flow from the Atlantic Watershed and from a point within only 300 feet of the summit of Backbone Mountain, which is the acknowledged watershed of the Appalachian Range, separating the waters which flow into the Atlantic from those that flow into the Mississippi and the Gulf of Mexico. Fairfax Stone stands upon a foothill of the Backbone Mountain and at a much lower elevation than Potomac Spring. Potomac Spring issues out of the east side of Backbone Mountain at a point 277.3 feet from the top of the mountain at an elevation of 3,365 feet, one of the very highest points on the Atlantic Watershed in Maryland and West Virginia.

Potomac Spring, by the undisputed testimony as ascertained by actual survey, is the westernmost source of the Potomac River, and a meridian drawn through it immediately across the crest of Backbone Mountain on the Atlantic
*7 * Watershed, at a point only 301.1 feet north of said spring, and thus leaves to the east of it all the waters of the Potomac River.

Potomac Spring as the initial point of the first fountain of the Potomac River at once gratifies the call in the charter of Maryland for both its western and southern boundaries.

Maryland is still entitled to the calls in her charter for the first fountain of the Potomac River and the meridian therefrom to the north, and no reason is shown by this record why this court should declare that she has forfeited this right.

The decree in this case will determine where the western boundary of Maryland is and will settle its location as by original right in the place decreed. *Rhode Island* v. *Massachusetts,* 12 Pet. 657.

The only "line" the defendant has attempted to set up as a boundary between the two States, and the one which, in her answer she maintains is the true boundary between the States, is the so-called Deakins "line," but these contentions are absolutely without foundation in fact, and her whole and entire position upon this question is predicated upon an absolutely baseless assumption of what Francis Deakins did, and an erroneous conception of the authority under which he acted at the time of laying out the military lots for the State of Maryland. The State of Maryland denies that the Deakins line is a true north line, and that the same was ever located as a true north line, and that the same was ever located from the Fairfax Stone, and that the same is even a continuous line between any termini, and that there is any evidence in this cause to show these alleged facts or any of them. The Deakins line, as a boundary line, is a mere myth, and in point of fact never did exist even as a continuous line between its north and south ends, and far less as a boundary line marking the western boundary of the State of Maryland.

The Deakins line never was authorized or recognized by the State of Maryland as a boundary, and there is absolutely no proof in this case tending

*8 to show that Francis Deakins laid * out said line. The State has always expressly denied that it was a boundary.

See resolutions passed by the First Constitutional Convention of Maryland in 1776, immediately after the recognition of the territorial rights of Maryland by the State of Virginia, through its representatives in its convention, and also see Act of Maryland, 1788, ch. 44, § 15.

Deakins neither mentioned nor suggested any such thing as a boundary of the State from one end of his report to the other.

None of the military lots in the western tier thereof depend upon or hang from the said Deakins line or any other line having any relation to the said Deakins line for their location.

Upon no hypothesis whatever can the Monroe line be regarded as making out or retracing or constituting in itself as an original location any boundary between Maryland and West Virginia; and it is nothing but a line of reference without any significance in this case.

The Potomac Meridian, located by the State of Maryland, with its initial point at Potomac Spring, the most western source of the Potomac River, and running thence north to Mason and Dixon's line as shown upon the plats of the plaintiff, stands as the only line located in this case by either party as a boundary between Maryland and West Virginia which is before the court and upon which as the case stands a decree can be rendered.

This case presents for final determination by this court a dispute which admittedly has been open and pending for more than a century and which during that period has been the subject of continuous discussion and controversy between the sovereign parties to this suit.

Maryland has presented her claim plainly and definitely upon her plats, shown by the result of actual survey upon the ground, and precisely indicating the boundary for which she contends as lawfully hers.

*9 * On the other hand, West Virginia fails to set up any counter location illustrative of her contention.

In view of the very great importance of this matter to both parties, we submit the inquiry to this tribunal, whether the strongest presumption ought not to obtain in favor of the clear and definite location which Maryland has made?

There has been no acquiescence upon the part of Maryland in the occupation or possession by West Virginia of any part of the territory embraced in the charter of Lord Baltimore in dispute in this case.

A State cannot be deprived of its territory by mere lapse of time or by mere occupancy, when all the while such State has challenged and denied the right of the invading party and repeatedly and persistently declared her own rights and when the right of such invasion and occupancy is universally regarded and again and again asserted to be an open, unsettled and pending question. Certainly down to 1859 Virginia recognized that the dispute was still pending and that the rights of both parties were the subject of negotiation and settlement. The Michler line was then run for the purpose of bringing the matter to a final determination. The failure of Virginia to ratify the work of Lieutenant Michler and establish the line run by him as the boundary between the two States left the controversy as it before stood and remitted Maryland to her charter rights.

There was no legal ratification by the act of 1860 or acquiescence by Maryland in any settlement or boundary. *Doddridge* v. *Thompson,* 9 Wheat. 476, 479; and see act of Congress of March, 1804; *Reynolds* v. *M'Arthur,* 2 Pet. 417; Acts of West Virginia of 1868, ch. 175, and of May 3, 1887.

It was only three years after that act was passed that this suit was instituted in this court by the Honorable William Pinkney Whyte, then Attorney General

of Maryland. In no instance has this court held that the doctrine of acquiescence can be invoked or applied where the boundary between the two States has
*10 all the time before the filing of suit in this court * been recognized by both of the States concerned as unsettled and subject to future determination, and pending between two States, and is so mutually regarded and acknowledged by them, and neither can be held to have abandoned her rights to the other, nor to have acquiesced in the claims of the other, nor to have either lost or acquired title by acquiescence or prescription, which, according to every writer on public and international law, is founded upon a presumed abandonment of right, and cannot arise where presumption of abandonment is rebutted and negatived by open and express declarations to the contrary. Vattel, Chitty's ed., bk. II, ch. 11, par. 139; Marten's Law of Nations, bk. II, ch. iii, § 1, title "Law of Nature and Nations," in law bk. IV, ch. 12, § 4; 22 Cyc. sub-title "Prescription," 1728; Oppenheim, Int. Law, V. I, § 243; Heimburger, p. 151; 1 Moore's Int. Law Dig., § 107, p. 466.

The claim of adverse possession cannot prevail, as upon the face of the record itself, as made up by defendant, there is a clear recognition of the right of the plaintiff to grant title, and through its grantees and those claiming under them, to hold possession of land west of such a line or lines. Adverse possession, in order to be effectual, must be exclusive. *Beatty* v. *Mason,* 30 Maryland, 409; *Armstrong* v. *Risteau,* 5 Maryland, 256; *Baker* v. *Swan,* 32 Maryland, 355, and cases cited on p. 359; *Robinson* v. *Minor,* 10 How. 643; *Pool* v. *Fleeger,* 11 Pet. 210; *Henderson* v. *Poindexter,* 12 Wheat. 530; 5 Cyc. title "Boundaries," p. 930.

The land between Fairfax and Potomac meridians is one entire and indivisible. If the patentee of a tract and those claiming under him can refer their holding and possession to the title derived from the State of Maryland, an unassailable case of mixed possession will be made out, and when two are in mixed possession of the same tract of land, the law considers him having the title as in possession to the extent of his rights. *Cheney* v. *Ringgold,* 2 H. & J. 84; *Lowell* v. *Stephens,* 2 McCrary, 311; so where there is joint possession
*11 by the legal * owner and claimant by possession at any time within the statutory period, the running of the statute will be arrested. *Henderson* v. *Griffin,* 5 Pet. 151; *Hall* v. *Powell,* 4 S. & R. 456; *Barr* v. *Gratz's Heirs,* 4 Wheat. 223; *Deputron* v. *Young,* 134 U. S. 225; *Hunnicutt* v. *Peyter,* 102 U. S. 333.

The State of Maryland claims that it has been established:

I. That the true construction of the grant of territory of the Maryland charter, as declared by all the authorities who have discussed it, calls for a meridian line running from the southern boundary of Pennsylvania to the first fountain or source of the Potomac River as the western boundary of Maryland; and for a line extending from said first fountain or source along the southern shore or bank of the Potomac River to the mouth thereof as the southwestern and southern boundary of the State.

II. That to adopt the Fairfax Stone as marking the source or first fountain of the Potomac River would defeat the calls of the charter for the boundaries above mentioned.

III. That the North Fork of the Potomac River is clearly marked by irresistible evidence as the main stream of the Potomac River, and that the Potomac Spring, being the source of the said North Fork, is the first fountain of Potomac River.

IV. That, therefore, the western, southwestern and southern boundaries are properly ascertained by a meridian running from the Pennsylvania line to the

Potomac Spring, and thence by a line along the southern bank of the stream or river flowing from said spring, to the mouth of said river.

V. That the controversy between Maryland and West Virginia as to the western and southwestern boundaries of the former having always been and being still an open, unsettled and pending question, the rights of Maryland to the boundaries called for by her charter, as above set forth, have not been forfeited or surrendered by her, and that this Honorable Court ought not to deprive her of them.

VI. That with respect to the tract in dispute between the two States
*12 growing out of the unsettled boundary line, Maryland * has made such grants and patents of extensive lands within said tract, and has so been in possession of parts of said tract as to bar and defeat all possible pretensions upon the part of West Virginia to an adverse possession of said tract so in dispute.

VII. That the equity and justice of this case, reinforcing the law of it, sustain the claims of the State of Maryland.

Mr. George E. Price, with whom *Mr. Wm. G. Conley,* Attorney General of the State of West Virginia, was on the brief, for the defendant:

The record in this case shows:

First: That the boundaries of Maryland are to be ascertained from the language of the Baltimore charter as applied to the conditions then existing and to the topography of the country afterwards ascertained, and by the interpretation given to it by the King in Council, and subsequent acts of both parties.

Second: That the charter calls for running from the Delaware Bay in a right line in the fortieth degree of north latitude to the true meridian *or* [of] the first source or fountain of the Potomac River, thence "tending downward toward the South to the farther bank of said river and following it to where it faces the Western and Southern coast as far as to a certain place called Sinquak, situate near the mouth of the same River, where it discharges itself in the forenamed Bay of Chessopeak."

Third: That as an original proposition, judging from the course of the river, the topography of the country and the size of the branches, the North Branch is the main Potomac River, and at the head of that branch is to be found the first source or fountain of the Potomac.

Fourth: That judging from the topography, the size of the branches and all the circumstances, the spring heads at which the Fairfax Stone was planted,
are the first source and fountain of the river, and that if the first source
*13 or fountain * were to be located and established according to present conditions, these springs could be selected with more reason than any other point.

Fifth: That the question as to the first source or fountain of the Potomac River was fully investigated and judicially determined by the only competent tribunal authorized to determine it, as early as 1746, in the controversy between Lord Fairfax and the Colony of Virginia, and the Fairfax Stone was planted in accordance with that determination, at the first fountain or source of the Potomac.

Sixth: That Lord Baltimore had notice of and was bound by and fully acquiesced in that decision, and the matter, therefore, is *res adjudicata* as to him and the State of Maryland.

Seventh: That the Colony of Virginia asserted and held jurisdiction of all the territory south and west of the head spring of the North Branch of the Potomac at the Fairfax Stone from the date of the decision in 1746 until after

the Revolution, and that the States of Virginia and West Virginia have held said territory and exercised governmental jurisdiction over it continuously and exclusively to the present time.

Eighth: That Lord Baltimore declined to take any steps to reopen the question after the decision in 1746, and that after the Revolution, although the State of Maryland has from time to time asserted a claim to go to the head spring of the South Branch of the Potomac, up to 1852, yet in that year and after that time she abandoned this claim, and has acquiesced in the claim of Virginia and West Virginia that the Fairfax Stone is at the first source or fountain of the Potomac, and that her western boundary line should begin at that point.

Ninth: That the belated attempt in this suit to fix the head spring of the North Branch at a point west of the Fairfax Stone is a creation of Mr. W. McCulloch Brown, the surveyor appointed in this cause, and is not maintainable upon any principle of law or equity; that whilst the spring head at
*14 * which Mr. Brown located the point for running the Brown-Potomac meridian is farther west than the spring head where the Fairfax Stone is located and is on somewhat higher ground, yet the branch of the stream running from that spring is not as long nor as large—certainly no larger, than the one running from the Fairfax Stone, and that at the point where these prongs branch off, the stream running to the Fairfax Stone is the straighter stream and has all the appearance of being the main river.

Tenth: That no claim has ever heretofore been made that this Brown-Potomac spring is the first fountain of the Potomac. No line has ever been run from it, and the territory one and a quarter miles wide and thirty-six miles in length, lying between the meridian run from this spring and that run from the Fairfax Stone is completely covered by Virginia patents settled by Virginia citizens, occupied by hundreds of farms and some villages, all of whom have, from the earliest times, adhered to the States of Virginia and West Virginia, and that Maryland has never exercised or attempted to exercise any governmental jurisdiction of any kind over it.

Eleventh: That prior to 1789, whilst at first there was some confusion in the issuing of patents for lands in that locality by the States of Virginia and Maryland, Virginia, in some instances, granting lands east of the due north line run from the Fairfax Stone, and Maryland granting some lands west of that line, yet, even before that date, a line had been run north from the Fairfax Stone and quite a number of Virginia patents had been granted as bordering upon that line, showing the claim of Virginia to go to that line as her boundary. And that Maryland had also granted several patents calling for that line as the boundary line.

Twelfth: In 1789, under the authority of the State of Maryland to lay out all of her western lands as bounty lands, Francis Deakins ran what he intended, and evidently believed, to be a due north line from the Fairfax Stone, and
*15 laid out the military lots up to and east of it, so far as the * lands had not previously been granted by the State of Maryland; that this line, so established was recognized and acquiesced in by both States from that time in 1789 until 1859, Maryland never having made a survey for any land west of the Deakins line between 1789 and 1859, but having made several grants that called for that line and Virginia having covered all the territory up to that line by her grants; having worked the roads, collected the taxes, assessed the lands, provided free schools for the children and in every other way, known to law, exercised governmental jurisdiction over the territory.

Thirteenth: That all of the territory west of this old line, which had been embraced within the old Maryland grants, based on surveys made prior to 1789,

was afterwards taken up and covered by Virginia patents and has been so held under said patents ever since, with the single exception of about one-half of the Elder Spring tract of 411 acres,—one-half of which is now assessed and held as being in West Virginia and the other half assessed and taxes paid upon it in Maryland; two persons living upon it claiming Maryland as their residence and voting in Garrett County, but it is covered by a Virginia patent; that with the exception of these two persons and of Ethbell Falkenstein, who has recently attempted to change his allegiance to the State of Maryland, all the other citizens and residents of this territory, up to this old line, have always held their allegiance to and recognized the government of Virginia and West Virginia. That between 1789 and 1859 Maryland in various ways by patents, etc., recognized the Deakins line.

Fourteenth: That for some reason, not fully explained, this old boundary line is not a continuous straight line, but is broken by offsets therein, but that it is well defined on the ground and recognized by the inhabitants, and many points in it have been located and established both by Mr. Brown, the surveyor on behalf of Maryland, and Mr. Monroe, surveyor on behalf of West Virginia, and
*16 by the evidence in the cause, * so that there is no difficulty in locating and establishing it as it has always been held and claimed, and is still held and claimed by the citizens on both sides.

Fifteenth: That this old line does not run in a due north course from the Fairfax Stone, but verges to the right of the true meridian, and by reason of this divergence and of the offsets above mentioned, it reaches the Pennsylvania line about three-quarters of a mile east of the true meridian; that the Michler line, run under the direction of the commissioners of Virginia and Maryland in 1859, by careful astronomical and scientific observations, is practically a due north line from the Fairfax Stone to the Pennsylvania line, although Dr. Bauer's report in this case attempts to show that there is some variations in it from the due north line; that the commissioners, under whose direction the Michler line was run, were not authorized to establish a new boundary line, but only to trace out, locate and establish the old line already existing, and that because this was not done, a considerable part of the territory occupied by Virginia and held under her titles, was left out and thrown on the Maryland side; and because Maryland refused to recognize and protect these titles, Virginia and West Virginia did not ratify or adopt this Michler line, but continued to hold to the old line and have so held ever since.

The court does not act differently in deciding on boundary between States than on lines between separate tracts of land. If there is uncertainty where the line is, if there is a confusion of the boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded, or, if the court is satisfied without either, it decrees what and where the boundary of a farm, a manor, a province or a State is and shall be. *Rhode Island* v. *Massachusetts,* 12 Pet. 658, 734, 738; *S. C.,* 4 How. 628; and see 1 Ves. Sen. 448–450.

*17 * A boundary established and fixed by compact between nations becomes conclusive upon all the subjects and citizens thereof and binds their rights and is to be treated, to all intents and purposes, as the true real boundary. The construction of such a compact is a judicial question, and this doctrine applies to the settlement of the boundary between two States of the Union by compact between such States. *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *Virginia* v. *Tennessee,* 148 U. S. 503; *Virginia* v. *West Virginia,* 11 Wall. 39.

That possession, or as it is called in books on international law, *usu caption,* for a long period of time is the best evidence of a national right. Vattel, 187, 191, etc.

Possession for a great many (more than one hundred) years becomes a rightful one by prescription, even if it had begun in wrong and injustice. The acquiescence of the adjoining State for such a lapse of time would be *conclusive* evidence that she assented to the possession thus held and had determined to relinquish her claim. *Rhode Island* v. *Massachusetts,* 14 Pet. 260, 261; *Rhode Island* v. *Massachusetts,* 4 How. 590, 591; *Louisiana* v. *Mississippi,* 202 U. S. 1.

Long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. *Indiana* v. *Kentucky,* 136 U. S. 479.

Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located, marked upon the earth and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant, and the line so established, takes effect not as an alienation of territory, but as a definition of the true and ancient boundary. *Virginia* v. *Tennessee,* opinion of Mr. Justice Field, p. 522; citing *Penn* v. *Ld. Baltimore,* 1 Ves. Sen. 444–448; *Boyd* v.
*18 *Graves,* 4 Wheat. * 513; *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *United States* v. *Stone,* 2 Wall. 525, 537; *Kellogg* v. *Smith,* 7 Cush. 375 382; *Chenery* v. *Waltham,* 8 Cush. 327; Hunt, Boundaries, 3d ed., 306; *Indiana* v. *Kentucky,* 136 U. S. 479, 516; *Rhode Island* v. *Massachusetts,* 4 How. 591, 639; Vattel, Law of Nations, bk. 2, ch. 11, § 149; Wheaton on Int. Law, pt. 2, ch. 4, § 164.

In *Virginia* v. *Tennessee* 148 U. S. 524, it was held that an agreement, for the appointment of commissioners to run and mark the boundary line between the States, did not require the approval of Congress, under the Constitution; that such approval was not necessary until the States had passed upon the report of the commissioners, ratified their action and mutually declared the boundary established by them to be the true and real boundary between the States, and that the consent of Congress to this final compact may be either express or implied. And the assent of Congress is implied from the fact that in the laying out of Federal judicial and revenue districts, and in the holding of Federal elections the line so agreed upon has been adopted and conformed to by Congress and the Federal Government. These are held to be sufficient facts from which the consent of Congress may be implied.

This court, in a case of disputed boundary between two States of the Union, has jurisdiction and power not to make a boundary, not to create a new line, but only to ascertain from the evidence before it, what is the real and true boundary between such States, and, when ascertained, to establish it by a final decree. If there has been a compact or agreement between the States, settling and fixing the boundary between them, this court will recognize and uphold such compact and establish the boundary according to its construction of the language of the compact. *Virginia* v. *Tennessee,* 148 U. S. 503; *Poole* v. *Fleeger,* 11 Pet. 185.

The existence of a compact or agreement between the States may be
*19 established by any evidence that satisfies the * mind of the court. A compact may be proven by the doctrine of estoppel.

Independently of any such compact, a boundary line between States, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even

if it be ascertained that it varies somewhat from the courses given in the original grant.

Where a line has been once run and has afterwards been acquiesced in for a long number of years by two States, the court will establish it, although it varies from the original course in the charter, and although it may not be a straight or uniform line. All that the court requires is to be satisfied as to the location of the old line. Then it establishes it as final. This is not only the rule between States, but it has always been the rule between individuals when establishing a boundary line. *Bartlett &c. Co.* v. *Saunders,* 103 U. S. 316; *McIvers, Lessee,* v. *Walker,* 9 Cranch. 173; *S. C.* 4 Wheat. 444; *Newsome* v. *Pryor,* 7 Wheat. 7; *Cavazos* v. *Trevino,* 6 Wall. 773.

Owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, wherever it may be found; nor in such case is the party precluded or estopped from claiming his own rights under the true one when discovered. *Schraeder Mining &c. Co.* v. *Packer,* 129 U. S. 688; *Hatfield* v. *Workman,* 35 W. Va. 578. But it is also held in the same cases that where a boundary line has been fixed as a settlement of a disputed boundary and possession taken and held in accordance with such settlement, the parties are bound by it, although the agreement of settlement is merely oral. Such parol agreement is not regarded as passing any land from one proprietor to the other, but as simply ascertaining the line run to which their respective deeds extend. See also *Gwynn* v. *Schwartz,* 32 W. Va. 487, 488, 500; *Le Compte* v. *Freshwater,* 56 W. Va. 336.

*20 Long acquiescence by one adjoining proprietor in a boundary, * as established by the other, is evidence of an agreement that such is the boundary. *Snead* v. *Osborne,* 25 California, 626; *Kip* v. *Norton,* 12 Wend. 127; *Jackson* v. *Ogden,* 7 Johns. 338; *Jackson* v. *Freer,* 17 Johns. 29; *McCormick* v. *Barnam,* 10 Wend. 104; *Dibble* v. *Rogers,* 13 Wend. 536; *Adams* v. *Rockwell,* 16 Wend. 285; *Van Wick* v. *Wright,* 18 Wend. 157; *Boyd's Lessee* v. *Graves,* 4 Wheat. 513; *Kellogg* v. *Smith,* 7 Cush. 375; *Jackson* v. *Bowen,* 1 Caines, 358–362; *Jackson* v. *Dysling,* 2 Caines, 198–200.

The action of a few isolated individuals cannot have the effect to prevent the State of West Virginia from getting the benefit of the doctrine of long continued possession and exercise of jurisdiction and governmental authority. *Virginia* v. *Tennessee,* 148 U. S. 527.

In a great controversy like this, where thousands of acres of land are involved and the rights of hundreds of people, the adverse attitude of two people claiming about 200 acres of land out of 8,000 or more cannot prevent the application of legal and equitable principles usual in such cases for the settlement of a controversy. *De minimis lex non curat.*

Great injury and loss would be inflicted upon the inhabitants living between the Deakins and the Michler lines if the Michler line should be established.

See *Coffee* v. *Groover,* 123 U. S. 1, under which case if the Michler line should be established as the true boundary line between the States, all the titles granted by Virginia east of that line will be void; that is to say, none of the several hundred inhabitants that live in that territory now, except two or three, will have any valid title to the lands which they occupy and which, in many instances, have been occupied by them and their predecessors in title for very many years; whilst the holders and claimants under the Maryland patents, which have been taken out simply to cover these lands and under which no possession or exercise of right has been had, will have the rightful legal title to these lands and will be able to turn the inhabitants now living there out of house and

*21 * home as the result of the decision of this question. This result would be

so disastrous, would rend so many home ties, break up tender associations and violate so many of the most tender sentiments of the human heart and cause such great suffering and loss that we feel sure this court will not render such a decision unless there is no escape from it under the principles of law and equity.

The north bank of the Potomac is the boundary line, and not the south bank.

West Virginia claims and insists that the boundary line between her and the State of Maryland is the line of low-water-mark on the north bank of the Potomac River, from the division line between Virginia and West Virginia to the head spring of the North Branch of the Potomac, the Fairfax Stone and thence running from said Fairfax Stone by the old Deakins line to the Pennsylvania line.

When the charter of Maryland was granted it is manifest that it was believed that the head spring of the Potomac River was north of the fortieth degree parallel.

An instrument will be construed according to the facts and circumstances and the knowledge and information of the parties to it at the time, so as to get at their intention and understanding. If the Maryland charter is construed in this way in the light of the knowledge of the parties to it at the time, then the boundary line was to run on the north, and not on the south bank of the Potomac River to the Chesapeake Bay.

The early and almost contemporary construction which was given to the Maryland charter by the King of England shows that it was understood by the King and his Council that the Potomac River had not been granted to Lord Baltimore by charter granted by Charles I. King Charles II, in 1649, in his grant of the northern neck of Virginia to the Earl of St. Albans and others, which was confirmed in 1663, granted the Potomac River and all the islands within its banks.

*22 * The treaty of peace between Great Britain and France, concluded in Paris February 10, 1763, fixed the boundaries of the several provinces of the respective sovereignties in America. The English maps made under that treaty show that the boundary line between Maryland and Virginia was distinctly laid down on the left, or the northern bank of the Potomac River.

Mitchell's map, which was made with the approbation and at the request of the Lords Commissioners for Trade and Plantation, 1750, published in 1755, shows the boundary line to be on the north bank of the Potomac.

The Virginia charters were cancelled under *quo warranto* proceedings, and the colonies became crown colonies, but her boundaries and jurisdiction were unaffected thereby and fully preserved. Lord Baltimore never regained the territory taken by Penn off the northern boundary. He never regained the territory included within the province of Delaware, and there is nothing to indicate that he ever regained the Potomac River after its grant to Lord Hopton and after the settlement with the parliamentary commissioners.

The King of Great Britain and his Council had absolute authority and control over the American colonies before the American Revolution and could change their limits and jurisdiction at his royal pleasure. It was, therefore, entirely within the power of Charles II to grant the Potomac River to Lord Hopton, as he did, although it may have been embraced within the limits of the charter previously; granted to Lord Baltimore.

Mr. Justice Day delivered the opinion of the court.

This case originates in a bill filed by the State of Maryland October 12, 1891, against the State of West Virginia, invoking the original jurisdiction of

this court conferred by the Constitution for the settlement of controversies between States. At its January session of 1890 the General Assembly of the
*23 * State of Maryland passed an act authorizing and directing its Attorney General to take such steps as might be necessary to obtain a decision of the Supreme Court of the United States which would settle the controversy between the States of Maryland and West Virginia concerning the true location of that portion of the boundary line between the two States lying between Garrett County, Maryland, and Preston County, West Virginia.

Preston County, West Virginia, was erected out of Monongalia County, Virginia, in the year 1818. Garrett County, Maryland, was erected out of the western portion of Alleghany County under chapter 212 of the Acts of the General Assembly of the State of Maryland of 1872.

The boundary in controversy runs between the two States from the headwaters of the Potomac to the Pennsylvania line.

The bill of complaint states the foundation of the Maryland title to be the charter granted on June 20, 1632, by King Charles I of England to Cecilius Calvert, Baron of Baltimore, all rights under which, it is averred, have vested in the complainant, the State of Maryland. Virginia, it is alleged, by her first constitution of June 29, 1776, disclaimed all rights to property, jurisdiction and government over the territory described in the charter of Maryland and the other colonies, in the following terms:

The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon."

*24 * The bill also recites complainant's title to the South Branch of the Potomac River. It avers the failure to settle the true location of the boundary line in dispute with West Virginia, which State succeeded to the rights and title of Virginia. The bill charges that the State of West Virginia is wrongly in possession of and exercising jurisdiction over a large part of the territory rightfully belonging to Maryland; that the true line of the western boundary of Maryland is a meridian running south to the first or most distant fountain of the Potomac River, and that such true line is several miles south and west of the line which the State of West Virginia claims, and over which she has attempted to exercise territorial jurisdiction.

The State of West Virginia filed an answer and cross bill, in which she sets up her claim concerning the boundary in dispute between the States, and says that the true boundary line, long recognized and established, is the one known as the "Deakins" line, and in the answer and cross bill she prays to have that line established as the true line between the States. She also alleges in her cross bill that the north bank of the Potomac River from above Harpers Ferry to what is known as the Fairfax Stone is the true boundary between the States; that West Virginia should be awarded jurisdiction over that portion of the river to the north bank thereof.

There is much documentary and other evidence in the record bearing upon the contention that the South Branch of the Potomac River is the true southern boundary of Maryland, but in the briefs and arguments made on behalf of Maryland, in this case the claim for the South Branch of the Potomac as the true boundary is not pressed and the controversy is narrowed to the differences in the location of the boundary, taking the North Branch of the Potomac River as the true southern boundary line of Maryland.

As we have already said, the contention of the State of Maryland is rested upon the construction of the charter granted by King Charles I, June 20,
*25 1632, to Lord Baltimore. * The part of the charter necessary to consider is here given in the original Latin, and the translation thereof, as the same is contended for in the brief filed for the State of Maryland:

Western and Southern Boundaries, which calls are as follows, to wit;

Transuendo o dicto æstuario vocato Delaware Bay recto linea per gradum prædictum usque ad verum Meridianum primi Fontis Fluminis de Pottomack deinde vergendo versus Meridiem ad ulteriorem dicti Fluminis Ripam et eam sequendo qua Plaga occidentalis ad Meridianalis [qu. plagam occidentalem et meridianalem] spectat usque ad Locum quendam appelatum Cinquack prope ejusdem Fluminis Osctium scituatum ubi in præfatum Sinum de Chessopeake evolvitur ac inde per Lineam brevissimam usque ad prædictum Promontorium sive Locum vocatum Watkin's Point.

Going from the said estuary called Delaware Bay in a right line in the degree aforesaid to the true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river and following it to where it faces the western and southern coasts as far as to a certain place called Cinquack situate near the mouth of the same river where it discharges itself in the aforenamed bay of Chesapeake and thence by the shortest line as far as the the aforesaid promontory or place called Watkin's Point.

There is some difference in the record as to the true Latin text and the translation thereof. For our purpose it is sufficient to consider that presented by the State of Maryland in the language above set forth. It is to be observed that the purpose of this part of the grant was to locate the northern line of the State of Maryland from Delaware Bay "to the true meridian of the first fountain of the river Potomac, then tending downwards towards the south to the farther bank of said river, and following it to where it faces the western and
*26 * southern coasts as far as to a certain place called Cinquack," etc.

It is the contention of the State of Maryland that the controversy between her and the State of West Virginia is narrowed to a proper location of the true meridian from the first fountain head of the Potomac River, which, being located, will effectually settle the boundary line in dispute. The claim of the State of Maryland may be further illustrated by a consideration of the plate exhibited in the brief filed in behalf of that State, which is herewith given.

It is to be noted in considering this plate that the north and south line at the left is called the Potomac meridian, running from a certain point designated

as the Potomac Stone. It is insisted for the State of Maryland that the spring at this point most nearly fulfills the terms of the Lord Baltimore charter, in that it properly locates the true meridian of the first fountain head of the Potomac River, and following it according to the description in the grant, embraces said river to its farther bank as the true boundary of Maryland.

On the other hand, West Virginia contends that the true head of the river

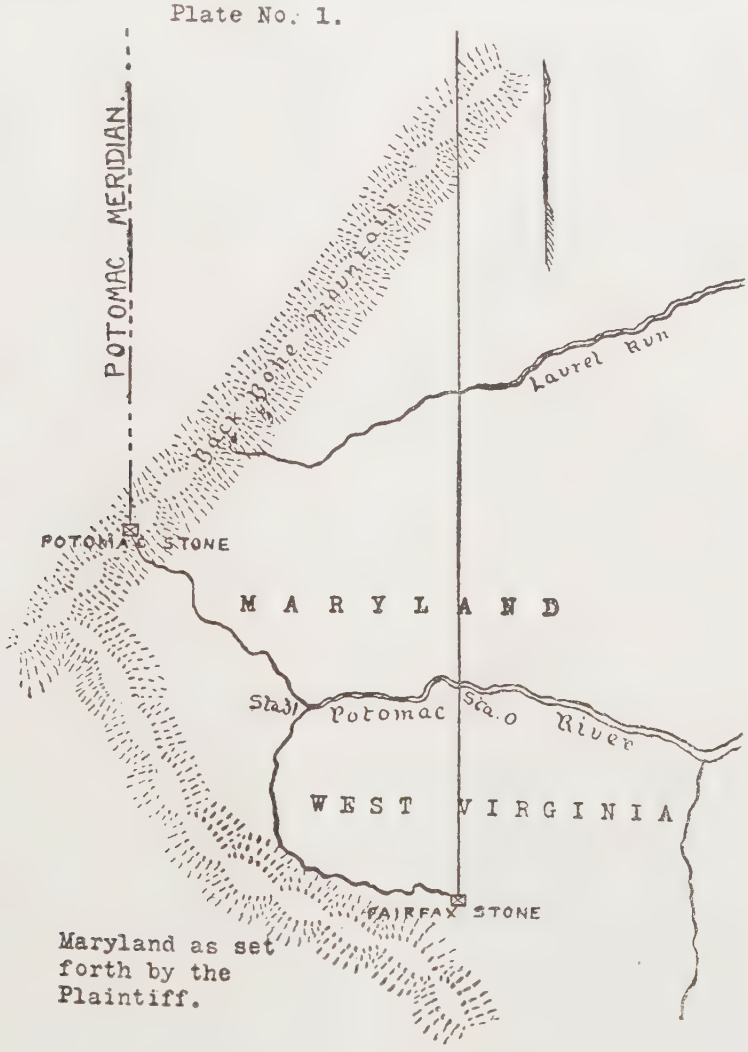


Plate No. 1.
POTOMAC MERIDIAN.
Laurel Run
POTOMAC STONE
M A R Y L A N D
Potomac
River
W E S T V I R G I N I A
FAIRFAX STONE
Maryland as set forth by the Plaintiff.

Potomac is at the Fairfax Stone, and that the boundary should be located by a line from the spring at that point; and that such has long been the recognized boundary line between Virginia, West Virginia and Maryland. The distance from the Fairfax meridian to the Potomac meridian is about one and one-fourth miles, and the distance to the Pennsylvania line about thirty-seven miles.

It may be true that the meridian line from the Potomac Stone, in the light

of what is now known of that region of country, more fully answers the calls in the original charter than does a meridian line starting from the Fairfax Stone. But it is to be remembered that the grant to Lord Baltimore was made when the region of the country intended to be conveyed was little known, was wild and uninhabited, had never been surveyed or charted, and the location of the upper part of the Potomac River was only a matter of conjecture.

*27 * It is said, and the record tends to show, that the only map of the country then known to be in existence was one prepared and published by Captain John Smith, upon which only a very small part of the Potomac River *28 is shown, and * from which we get no light as to the true source and course of the upper reaches of the Potomac River. The so-called Potomac Stone was neither set nor located until 1897, six years after the beginning of this suit, when it was put in place by the surveyor in this case on the part of the State of Maryland. He then set a monument designated as the "Potomac Stone," and gave the name Potomac to the spring at the origin of that fork of the Potomac River. The so-called Potomac meridian was run by the same engineer, located and named by him in the year 1897.

The Fairfax Stone, which is shown at the beginning of the north and south line in plate No. 1, has a history and importance in this case which renders it necessary to note something of its origin and location. Without going into a history of the prior grants in Virginia, we come directly to the one bearing upon this case. It was made in September, 1688, by King James II of England, for the Northern Neck of Virginia to Thomas (Lord) Culpeper, which subsequently became the property of Lord Fairfax, and is usually spoken of as the Fairfax grant. That grant was under consideration in this court in the case of *Morris* v. *The United States,* 174 U. S. 198, a case to which we shall have occasion to refer later, and from page 223 of that report we take a description of so much of the grant as is necessary to a consideration of this cause. The Northern Neck of Virginia is described in that grant as follows:

"All that entire tract, territory or parcel of land situate, lying and being in Virginia in America, and bounded by and within the first heads or springs of the rivers of Tappahannock als. Rappahannock and Quiriough als. Patawamerck Rivers, the courses of said rivers from their said first heads or springs, as they are commonly called and known by the inhabitants and description of those parts and the bay of Chesapeake, together with the said rivers themselves and all the islands within the outermost banks thereof, and the soil of all and singular the premises, and all lands, woods, underwoods, timber and trees, wayes, *29 mountains, swamps, marshes, * waters, rivers, ponds, pools, lakes, watercourses, fishings, streams, havens, ports, harbours, bays, creeks, ferries, with all sorts of fish, as well as whales, sturgeons and other royal fish. . . . To have, hold and enjoy all the said entire tract, territory or portion of land, and every part and parcel thereof. . . . to the said Thomas, Lord Culpeper, his heirs and assigns forever."

The territory embraced in this Northern Neck became subject to the jurisdiction and dominion of Virginia and the boundary lines fixed for it become important in determining the true boundary between Virginia and adjoining States. In the grant to Lord Culpeper the tract is described as lying in Virginia in America, and bounded by and within the first heads of springs of the rivers

Rappahannock and Patowmack. Disputes having arisen between the Governor and Council of Virginia and Lord Fairfax, touching the true boundary of the grant, an order was made on November 29, 1733, by the King in Council, reciting that Lord Fairfax had petitioned for an order to settle the boundaries of his tract, and for a commission to issue, run out and ascertain the boundaries of the same. The King granted an order, and thereafter the Governor of Virginia on September 7, 1736, appointed certain commissioners to act for the colony of Virginia in the matter; Lord Fairfax appointed certain commissioners to act on his behalf.

The instructions to the commissioners required them to make a clearer description of the boundaries in controversy, to make exact maps of the rivers Rappahannock and Potomac, and the branches thereof to the head or spring, so-called or known, and the surveys made by them with correct maps thereof to be laid before His Majesty. The commission adopted the North Branch of the Potomac River, then known as the Cohaungoruton, and after further proceedings, which are not necessary to recite in detail, and after a reference to the Lords of Trade and Plantations, a report was made which, among other
*30 things, stated that a line run from the first head * or spring of the south or main branch of the Rappahannock River to the first head or spring of the Potomac River is, and ought to be, the boundary line determining the tract or territory of land commonly called the Northern Neck. Ultimately the matter was laid before the King in Council, and commissioners were appointed to mark and run the line between the head spring of the rivers Rappahannock and Potomac, and the stone called the Fairfax Stone was planted in September, 1746, at the head spring of the Potomac River. In 1748 the location of the stone was approved by the Virginia assembly and the King in Council. This Fairfax Stone has been an important monument in settling and establishing boundaries since that time.

It was found still in place in 1859 by Lieutenant Michler, who made a survey on behalf of the boundary commissioners of Maryland and Virginia, to which we shall have occasion to refer later on. In his report Lieutenant Michler describes the stone as follows:

"The initial point of the work, the oft-mentioned, oft-spoken of 'Fairfax Stone,' stands on a spot encircled by several small streams flowing from the springs about it. It consists of a rough piece of sandstone indifferent and friable, planted to a depth of a few feet in the ground and rising a foot or more above the surface. Shapeless in form, it would scarcely attract the attention of the passerby. The finding of it was without difficulty and its recognition and identification, by the inscription 'Ffx,' now almost obliterated by the corroding action of water and air."

Without stopping to mention the cases in which Virginia has recognized this monument in creating counties and otherwise, it is to be noted that it was recognized as a boundary point by the State of Maryland in erecting Garrett County, the boundary between which and Preston County, West Virginia, it was the purpose of the act of the legislature of Maryland to have settled by the filing of the bill and proceedings in the present case.

*31 * By the constitution of Maryland of 1851 it is provided (article 8, § 2):
"When that part of Alleghany County lying south and west of a line

beginning at the summit of Big Back Bone or Savage Mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage River where it empties into the Potomac River, thence by a straight line to the nearest point or boundary of the State of Virginia, thence with said boundary to the Fairfax Stone, shall contain a population of ten thousand, and if the majority of the electors thereof shall desire to separate and form a new county and make known their desire by petition to the legislature, and legislature shall direct, at the next succeeding election, that the judges shall open a book at each election district in said part of Alleghany County and have recorded therein the vote of each elector 'for or against' a new county. In case the majority are in favor then said part of Alleghany County to be declared an independent county, and the inhabitants whereof shall have and enjoy all such rights and privileges as are held and enjoyed by the inhabitants of the other counties in this State."

In the act of 1872, creating Garrett County, it is provided:

"That all that part of Alleghany County lying south and west of a line beginning at the summit of Big Back Bone or Savage Mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage River where it empties into the Potomac River; thence by a straight line to the nearest point or boundary of the State of West Virginia, then with the said boundary to the Fairfax Stone, shall be a new county, to be called the county of Garrett, provided," etc.

It appears that not infrequent attempts have been made to settle the controversy between the States now at the bar of this court. In the years 1795, 1801 and 1810 certain commissioners were provided for by the State of Maryland to meet commissioners to be appointed by the State of Virginia, with
*32 * power to adjust the boundary between the southern and western limits of the State of Maryland and the dividing line between it and Virginia. Nothing seems to have come of these attempts.

In 1818 the State of Maryland passed an act proposing to Virginia the appointment of a commission, to run a line from the most western source of the North Branch of the Potomac.

In February, 1822, the legislature of Virginia expressed its willingness to appoint commissioners, who were to locate the western boundary by a stone located by Lord Fairfax at the headwaters of the Potomac River. The commissioners met, but the divergency in their instructions prevented any action.

In 1825 Maryland passed an act for the settlement of the boundary, providing that the Governor of Delaware should act as umpire. In 1833 Virginia passed an act providing for commissioners to run the lines from the Fairfax Stone, or, at the first fountain of the Cohangoruton or North Branch of the Potomac River. In default of Maryland appointing commissioners, Virginia commissioners were to run and mark the line.

In October, 1834, the State of Maryland filed a bill in this court against the State of Virginia, which bill was subsequently dismissed without any action being taken thereon. In 1859 a line was run by Lieutenant Michler, of the United States Topographical Engineers, to which we shall have occasion to refer more in detail later on.

By an act of 1781 the State of Maryland appropriated land within the State

in Washington County west of Fort Cumberland, with certain exceptions, to discharge the engagements of the State to the officers and soldiers thereof, and, by a resolution passed in April, 1787, the Governor and Council were requested "to appoint and employ some skilful person to lay out the manors, and such parts of the reserve and vacant lands, belonging to this State, lying to the west of Fort Cumberland, as he may think fit and capable of being settled
*33 * and improved, in lots of fifty acres each, bounded by a fixed beginning and four lines only, unless on the sides adjoining elder surveys; that the beginning of each lot be marked with marking irons, or otherwise, with the number thereof, and that a fair book of such surveys, describing the beginning of each lot by its situation, as well as number, be returned and laid before the next general assembly."

Under this resolution Francis Deakins was appointed to make the survey, and, in 1788, an act of the general assembly of Maryland was passed. It reads, in part, as follows:

"And whereas, in pursuance of a resolve of the general assembly, at April session, seventeen hundred and eighty-seven, authorizing the governor and council to appoint and employ some skilful person to lay out the manors, and such parts of the reserves and vacant land belonging to this State (lying to the westward of Fort Cumberland, as he might think fit and capable of being settled and improved, in lots of fifty acres each, Francis Deakins was appointed and employed by the governor and council for that purpose, and has finished the said survey, and has returned a general plot of the county westward of Fort Cumberland, on which four thousand one hundred and sixty-five lots of fifty acres each are laid off, besides sundry tracts which have been patented, distinguishing on the plot those lots which have been settled and improved from those which remain uncultivated; and the said Francis Deakins has also returned two books, entitled A and B, in which are entered certificates of all of the lots before mentioned."

And further enacted that 2,575 of the aforesaid lots were contained in the following limits: "Beginning at the mouth of Savage River and running with the North Branch of the Potomac River to the head thereof, then with the present supposed boundary line of Maryland until the intersection of an east line to be drawn from said boundary line with a north course from the mouth of Savage River, will include the number of lots aforesaid to be distributed
*34 by lot among * the said soldiers and recruiting officers, and their legal representatives," etc.

And it further provides that lots granted to officers should be adjacent to those distributed to the soldiers, within the following limits: "By extending the aforesaid north course from the mouth of Savage River, until its intersection with an east line to be drawn from the aforesaid supposed boundary line of Maryland will include the necessary number allowing to each officer or his representatives four lots aforesaid."

The act also contains the following language:

"And be it enacted, that the line to which the said Francis Deakins has laid out the said lots, is in the opinion of the general assembly, far within that which this State may rightfully claim as its western boundary; and that at a

time of more leisure the considerations of the legislature ought to be drawn to the western boundaries of the State, as objects of very great importance."

Deakins filed a map, which is in evidence in this case and which shows a large number of lots laid out and also certain outlines of deeds and grants. This line in the briefs and records is sometimes mentioned as having been run in 1787, sometimes 1788, and sometimes 1789. In view of the act of 1788 the line was probably run in that year. As in our view of the case, the action of Deakins in the location of this line and his evident adoption of the Fairfax Stone as a starting point, is an important feature of this controversy, we insert herein a tracing from the original Deakins map put in evidence on the part of the State of West Virginia. An inspection of this map shows a north and south line upon the west side thereof, and also some of the military lots laid out by Deakins in that part of the tract. It is to be noted that this north and south line is marked: "The meridian line and the head of the North Branch of the Potowmack River as fixed by Lord Fairfax." This could mean but one thing, and that is, an attempted meridian line north from the Fairfax Stone, located to the Pennsylvania line.

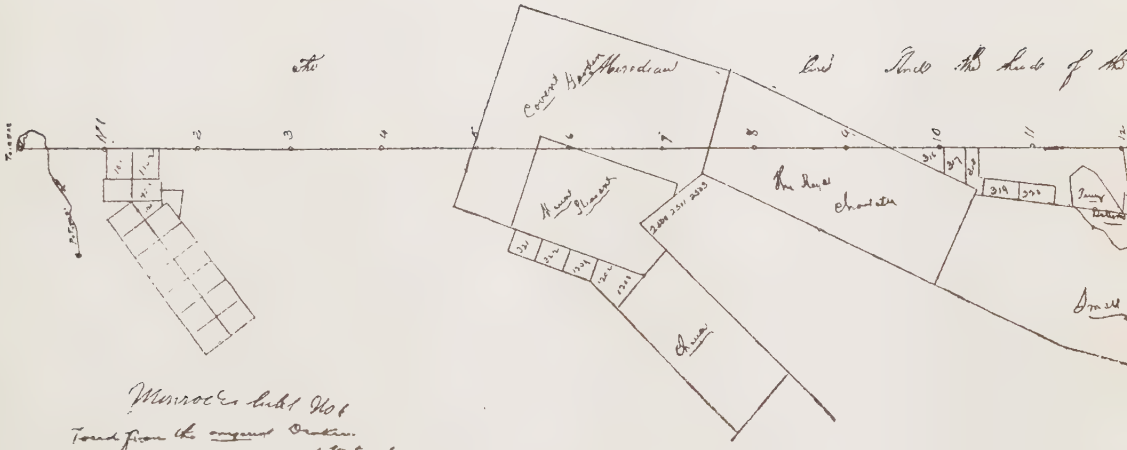
*35 * We shall have occasion to recur to this line.

In 1852 the legislature of the State of Maryland passed an act concerning the disputed boundary, which act provides:

"Whereas it is of great importance that the western territorial limit of the State of Maryland be clearly defined and her boundary be permanently established; and whereas, the true location of the western line of Maryland between the States of Maryland and Virginia beginning at or near the Fairfax Stone on the North Branch of the Potomac River, at or near its source, and running in a due north line to the State of Pennsylvania, is now lost and unknown and all the marks have been destroyed by time or otherwise; and whereas, the States of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits of ejectment are now pending in the Circuit Court of Allegheny County, in the State of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the State of Virginia, which cannot be justly settled without establishing said boundary line.

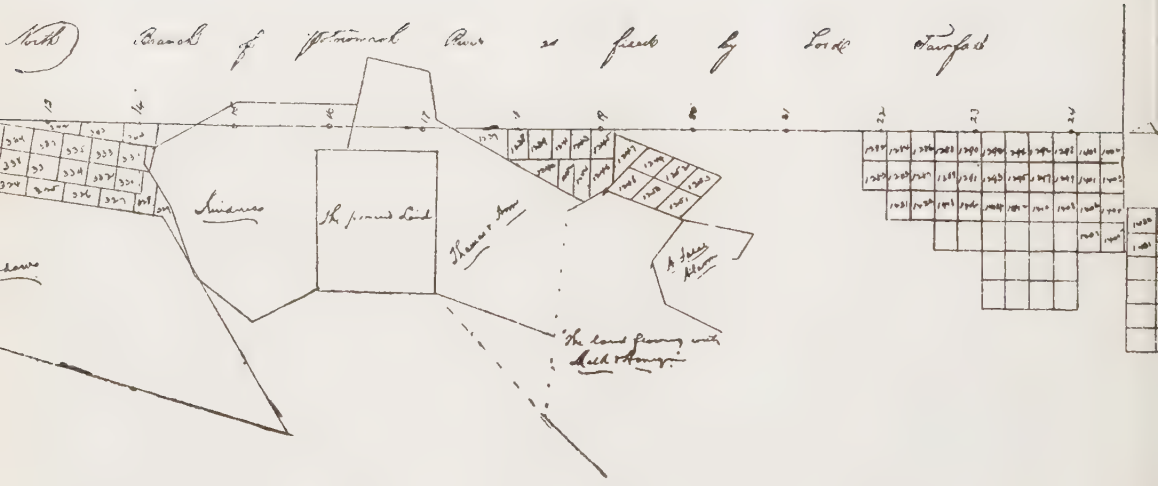
"Therefore, Section 1. Be it enacted by the General Assembly of Maryland, that the governor be and he is requested to open a correspondence with the governor of Virginia in relation to tracing, establishing and marking the said line, and in case the legislature of Virginia shall pass an act providing for the appointment of a commissioner to act in conjunction with a commissioner on the part of Maryland in the premises, then and in such case, the governor be and he is hereby authorized and requested to appoint a commissioner who, together with the commissioner who shall be appointed on the part of Virginia, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments beginning therefor at the said Fairfax Stone and running thence due north to the line of the State of Pennsylvania.

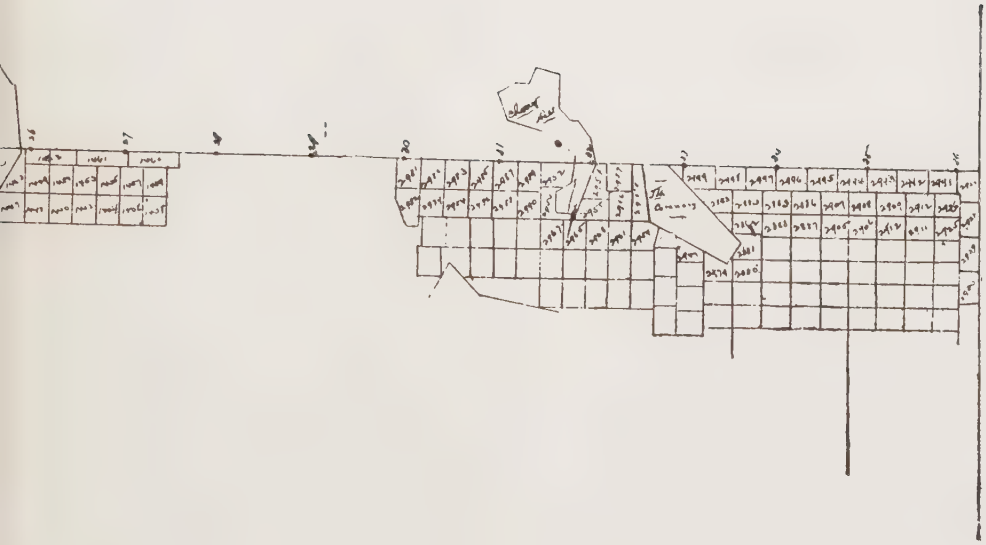
*36 "SEC. 2. And be it enacted, that it shall be the joint duty * of the commissioners after running, locating, establishing and marking the said line, to make a report setting forth all the facts touching, locating and marking said line; and it shall be the duty of the commissioner of each respective State to



Missrocks Inlet 1804

Found from the augment Station.
[illegible] the Meridian line located A Watermark
of Rock Inscribed on 1769:90 bay [illegible]
Transit Station - 220 chains
Sunspun Mid - Sept 23 - 9h -
9h m.


North Branch of Patuxent River as fixed by Lord Fairfax
Thomas Snow
The land passing with Mill Houses



forward copies of the joint report to each of their respective legislatures; and upon the ratification of said report by the State of Virginia and the State of Maryland, through their respective legislatures, the said boundary lines shall be fixed and established so to remain forever, unless changed by mutual consent of the two States."

In 1854 the general assembly of Virginia met this action upon the part of the State of Maryland by the passage of an act, which provides:

"Whereas the general assembly of Maryland has passed an act for running and marking the boundary line between that State and the State of Virginia, beginning therefor at the Fairfax Stone on the Potomac River, sometimes called the North Branch of the Potomac River at or near the source and running thence due north to the line of the State of Pennsylvania; and whereas the legislature of Maryland has requested the appointment of a commissioner on the part of this State to act in conjunction with the commissioner of Maryland to run and mark said line: therefore, be it enacted,

"1. That the governor appoint a commissioner who, together with the Maryland commissioner, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments, beginning therefor at the Fairfax Stone, situated as aforesaid, and running thence due north to the line of the State of Pennsylvania."

And the act concludes:

"Upon the ratification of such report by the legislatures of the States of Virginia and Maryland the said boundary line shall be fixed and established to remain forever, unless changed by mutual consent of the said States."

Under these acts of the legislatures of the respective States commis-
*37 sioners were appointed, who made application to the * Secretary of War for the services of an officer of the United States Engineers to aid them in carrying out the purposes of the acts. Upon this application the Secretary of War detailed Lieutenant N. Michler, of the United States Topographical Engineers. As directed in both the acts, Lieutenant Michler commenced his work at the Fairfax Stone, and ran a line northwardly, marking it at certain places. This line intersected the Pennsylvania line at a point about three-fourths of a mile west from the northern extremity of the Deakins line, which had been run in 1788, as we have already stated. There was a triangle between the Deakins and Michler lines, having its apex at the Fairfax Stone, and lines diverging thence, until there was a difference of three-fourths of a mile at the base of the triangle at the Pennsylvania line.

It appears that the commissioners of the two States differed, the commissioner of Virginia contending that by the act of the legislature, above referred to, that State had not adopted the meridian line from the Fairfax Stone as the boundary. The commissioner of Maryland contended for that meridian line. On March 5, 1860, the legislature of Maryland passed an act adopting the Michler line, commencing at the Fairfax Stone at the head of the North Branch of the Potomac River, and running thence due north to the southern line of Pennsylvania, as surveyed in the year 1859 by commissioners appointed by the States of Maryland and Virginia, and thereafter the State of Maryland provided for the marking of the Michler line.

Virginia did not approve of the Michler line, but in 1887 West Virginia

passed an act confirming the line as run by Lieutenant Michler in 1859 as the true boundary line between West Virginia and Maryland, but the act was not to take effect until and unless Maryland should pass an act or acts confirming and rendering valid all the entries, grants, patents and titles from the Commonwealth of Virginia to any person, or persons, to lands situate and lying between the new Maryland line and the old Maryland line heretofore
*38 claimed by * Virginia and West Virginia, to the same extent and with like legal effect as though the said old Maryland line was confirmed and established.

The divergence between Michler's line and the line shown on Deakins' map probably arises from the fact that Lieutenant Michler ran a true astronomical line, and that his line is a true north and south line, whereas the Deakins line was probably run with a surveyor's compass, and with less accuracy than the Michler line.

It is the contention of the State of Maryland that Deakins never attempted to run a true north and south line; that he never had any authority from the State of Maryland so to do; and, that in the act confirming the laying out of the lots by Deakins it was especially declared by the State of Maryland that it did not show the true western boundary of the State; furthermore, that the attempts which have been made to trace the Deakins line show that it is not a true north and south line, but a broken line, having offsets in various places.

The State of Maryland insists that the evidence shows that a number of old grants made prior to the Deakins survey would extend west of the boundary line, as shown either by Deakins or Michler. It is the contention of the State of Maryland that when these grants were made she indicated a line further to the west than either of these lines, and that the ancient grants of large tracts of land show that fact. But the evidence contained in this record leaves no room to doubt that after the running of the Deakins line the people of that region knew and referred to it as the line between the State of Virginia and the State of Maryland. Lieutenant Michler in the frank and able report filed with his survey, recognizes this situation, for he says:

"The meridian as traced by me last summer differs from all previous lines run; some varying too far to the east, others too far to the west. The oldest one, and that generally adopted by the inhabitants as the boundary line,
*39 passes to * the east; and from measurements made to it I found that it was not very correctly run. The surveyor's compass was used for the purpose, and some incorrect variation of the needle allowed. Owing to the thick and heavy growth of timber, it is utterly impossible to run a straight line through it without first opening a line of sight. It could only be approximately done.

"When north of the railroad, and the nearer the Pennsylvania line is approached the settlements and farms become more numerous; and if the meridian line is adopted as the boundary, it will cause great litigation, as the patents of most of the lands call for the boundary as their limits. On the Pennsylvania boundary the new line is about three-quarters of a mile west of the old; on the railroad—feet; at Weill's field, 85 feet; on the northwestern turnpike, about 40 feet, and on the backbone, about 20 feet."

These recitals from Lieutenant Michler's report, if the record were lacking in other evidence, would leave little doubt that there was an old boundary line,

generally adopted, and that the adoption of the true meridian line, which Lieutenant Michler ran, would cause great litigation because of the acquiescence of the people in the old boundary line, the Deakins line.

The report of the committee of the Maryland Historical Society, an exhibit in this case, contains a history of the boundary dispute, and it is therein said:

"The provisional line of 1787, or 'Deakins line,' as it was called, had long done duty as a boundary; and as the State granted no lands beyond it, it came to be looked upon—despite the emphatic protest of the assembly of 1788, as the true boundary line of the State. In process of time the marks became obliterated, and conflicts of title and litigation arose between the holders of Maryland and the holders of Virginia patents for lands in the debatable territory. So in May, 1852, the Maryland legislature passed an act reciting
*40 these facts and requesting the governor to open a correspondence with * the governor of Virginia about the matter; and authorizing him to appoint a commissioner, if the legislature of Virginia would also appoint one, which joint commission should run and mark a line due north from the Fairfax Stone, which line, when ratified by both legislatures, should be the boundary between the States."

The State of Maryland has herself, in sundry grants, recognized this old line. In a grant by the State of Maryland for a tract called "Maryland," dated January 23, 1823, among other calls is this one: "Running thence south thirty-six degrees west, eighty-six perches to the Virginia and Maryland line, as run under the directions of Francis Deakins at the time of laying out the lots to the westward of Fort Cumberland, and thence running," etc.

In the Deakins description of the first lot north of the Fairfax Stone the following language is used in describing military lot No. 1101:

"Beginning at a bounded maple marked 1100, *standing one mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Powtomack River,* and running north 89½ perches; east, 89½ perches; south, 89½ perches; then to the beginning, containing 50 acres."

This record leaves no doubt as to the truth of the statement contained in the report of the committee of the Maryland Historical Society, that the Deakins line, before the passage of the act under which the Michler line was run, had long been recognized as a boundary and served as such. Even after the Michler line was run and marked the testimony shows that the people generally adhered to the old line as the true boundary line. There are numerous Virginia grants and private deeds of land given in the record, which call for this old Maryland line as the boundary.

The testimony shows that the people living along the Deakins line worked and improved the roads on the Virginia side, as a general rule, up to this line. Correspondingly, Maryland worked the roads on the other side of this
*41 line. On the * west of the line the people paid taxes on their lands in Preston County, West Virginia. They voted in that county, and with rare exceptions regarded themselves as citizens of West Virginia. As a general rule, the schools established there were West Virginia schools. The allegiance of nearly all these people has been given to West Virginia.

It is true there has been more or less contention as to the true boundary line between these States. Attempts have been made to settle and adjust the

same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society. In the proposed settlements, for many years, Virginia and West Virginia have consistently adhered to the Fairfax Stone as a starting point for the disputed boundary. When West Virginia passed the act of 1887, ratifying the Michler line, it was upon condition that Virginia titles granted between the Michler line and the old Maryland line should be validated. Maryland, in the act of 1852, recognized the same starting point.

And the fact remains that after the Deakins survey in 1788 the people living along the line generally regarded that line as the boundary line between the States at bar. In the acts of the legislatures of the two States, to which we have already referred, resulting in the survey and running of the Michler line, it is evident from the language used that the purpose was not to establish a new line, but to retrace the old one, and we are strongly inclined to believe that had this been done at that time the controversy would have been settled.

A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored. In
*42 the case of *Virginia* v. *Tennessee,* 148 U. S. 503, 522, 523, * Mr. Justice Field, speaking for the court, had occasion to make certain comments which are pertinent in this connection, wherein he said:

"Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke in *Penn* v. *Lord Baltimore,* 1 Vesey Sen. 444, 448; *Boyd* v. *Graves,* 4 Wheat. 513; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 734; *United States* v. *Stone,* 2 Wall. 525, 537; *Kellogg* v. *Smith,* 7 Cush. 375, 382; *Chenery* v. *Waltham,* 8 Cush. 327; Hunt on Boundaries (3d ed.), 396.

"As said by this court in the recent case of the *State of Indiana* v. *Kentucky,* 136 U. S. 479, 510, 'it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' In the case of *Rhode Island* v. *Massachusetts,* 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy

*43 in which this great principle may be invoked * with greater justice and propriety than a case of disputed boundary.' "

And quoting from Vattel on the Law of Nations to the same effect (§ 149, p. 190):

"The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute, and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."

And adds from Wheaton on International Law (§ 164, p. 260):

"The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner, as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the articles or property in question."

And it was said:

"There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to the country, to home and to family, on which is based all that is dearest and most valuable in life."

In *Louisiana* v. *Mississippi,* 202 U. S., 1, 53, this court said:

"The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion
*44 of a particular boundary and * the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations.

True it is, that, after the running of the Deakins line, certain steps were taken, intended to provide a more effectual legal settlement and delimitation of the boundary. But none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line.

The effect to be given to such facts as long continued possession "gradually ripening into that condition which is in conformity with international order," depends upon the merit of individual cases as they arise. 1 Oppenheim International Law, § 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown with-

out doing violence to principles of established right and justice equally binding upon States and individuals. *Rhode Island* v. *Massachusetts,* 12 Pet. 657.

It may be true that an attempt to relocate the Deakins line will show that it is somewhat irregular, and not a uniform, astronomical north and south line; but both surveyors appointed by the States represented in this controversy were able to locate a number of points along the line, and the northern limit thereof is fixed by a mound, and was located by the commissioners who fixed the boundary between West Virginia and Pennsylvania by a monument which was erected at that point, and we think from the evidence in this record
*45 * that it can be located with little difficulty by competent commissioners.

We think, for the reasons which we have undertaken to state, that the decree in this case should provide for the appointment of commissioners whose duty it shall be to run and permanently mark the old Deakins line, beginning at a point where the north and south line from the Fairfax Stone crosses the Potomac River and running thence northerly along said line to the Pennsylvania border.

As to the contention made by West Virginia in her cross bill, that she is entitled to the Potomac River to the north bank thereof, we think that claim is disposed of by the case of *Morris* v. *United States,* 174 U. S. 196, already referred to. In that case, among other things, there was a controversy between the heirs of James H. Marshall and the heirs of John Marshall as to the ownership of the bed of the Potomac River from shore to shore, including therein certain reclaimed lands. Claims of the one set of heirs were based upon the charter of Lord Baltimore of June, 1632, and that of the others upon the grant of King James II to Lord Culpeper, afterwards owned by Fairfax, to which we have already referred.

After making reference to the award of the commission to fix the Virginia and Maryland boundary, appointed in 1877, fixing the line and boundary at low-water-mark on the Virginia shore, to which arbitration the State of West Virginia was not a party, this court disposed of the controversy, irrespective of that award, in the following language, used by Mr. Justice Shiras in delivering the opinion of the court:

"Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac River, or as establishing a compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter
*46 granted to Lord * Baltimore, by Charles I, in 1632, of the territory known as the province of Maryland, embraced the Potomac River and soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.

"The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to property rights in the Potomac River, or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands

or soil under the river to private persons. Her claim seems to have been that of political jurisdiction."

We think this decision disposes of and denies this claim of the State of West Virginia in her cross bill.

Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. If this decision can possibly have a tendency to disturb titles derived from one State or the other, by grants long acquiesced in, giving the force and right of prescription to the ownership in which they are held, it will no doubt be the pleasure as it will be the manifest duty of the lawmaking bodies of the two States to confirm such private rights upon principles of justice and right applicable to the situation.

A decree should be entered settling the rights of the States to the western boundary, and fixing the same, as we have hereinbefore indicated, to be run and established along the old line known as the Deakins or old state line; and commissioners should be appointed to locate and establish said line as near as may be. The cross bill of the State of West Virginia should be dismissed *47 in so far as it asks for a decree fixing * the north bank of the Potomac River as her boundary. Counsel for the respective States are given forty days from the entry hereof to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the States.

Decree accordingly.

State of Maryland v. State of West Virginia.

Supreme Court of the United States, 1910.

[217 *United States,* 577.]

Length of time that raises a right by prescription in private parties, likewise raises such a presumption in favor of States.

Consistently with the continued previous exercise of political jurisdiction by the respective States, Maryland has a uniform southern boundary along Virginia and West Virginia at low-water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia.

The division of costs between States in a boundary dispute is one governmental in character in which each party has not a litigious, but a real, interest, for the promotion of the peace and good of the communities, and all expenses including those connected with making the surveys should be borne in common and included in the costs equally divided between the States.

Decree in 217 U. S. 1, settled.

THE facts involved in this case are stated in the opinion of the court delivered February 21, 1909, *ante,* p. 1; the particular facts involved in the settlement of the decree are stated in the opinion following.

Mr. Isaac Lobe Straus, Attorney General of the State of Maryland, for Maryland.

Mr. William G. Conley, Attorney General of the State of West Virginia, and *Mr. George E. Price* for West Virginia.

MR. JUSTICE DAY delivered the opinion of the court.

*578 In accordance with the opinion of this court handed * down February 21, 1910, *ante,* p. 1, the learned counsel for the States of Maryland and West Virginia have submitted drafts of a decree to be entered in the case in accordance with the conclusions announced by this court.

The differences in the proposed decrees are: first, concerning the boundary of Maryland along the south bank of the Potomac River from a point at or near Harper's Ferry, westwardly to the point where the north and south line from the Fairfax Stone crosses the North Branch of the Potomac River, should that boundary line be located at high-water mark as contended by counsel for the State of Maryland, or at low-water mark as contended by counsel for the State of West Virginia? In the opinion heretofore delivered in this case it was declared that the claim of the State of West Virginia for a location of her boundary line along the north bank of the Potomac River should be denied. This conclusion was reached upon the authority of the case of *Morris* v. *United States,* 174 U. S. 196. In the *Morris case* it was held in a contention between a title holder whose rights originated with the grant of 1632 to Lord Baltimore, and one whose rights originated under the grant of James II to Lord Culpeper, that the grant to Lord Baltimore included the Potomac River to high-water mark on the southern or Virginia shore. As West Virginia is but the successor of Virginia in title, the conclusion thus announced in the *Morris case* necessarily denied her claim to the Potomac River to the north bank thereof, and a decree was directed dismissing the cross bill of West Virginia in which such a claim was made.

In the former hearing, however, and in the decision rendered, the attention of the court was not directed to the question whether the boundary of Maryland should be at high-water mark or at low-water mark along the southern bank of the Potomac River.

*579 * As stated in the former opinion, after the State of West Virginia was created, an arbitration was had between the States of Virginia and Maryland, and the Virginia boundary was fixed at low-water mark on the south shore of the Potomac. See Code of Virginia, v. 1, title 3, ch. 3, § 13, p. 18. This location of the boundary between Maryland and Virginia was accepted by the State of Maryland and definitely fixed as the line between herself and the State of Virginia. The arbitration of 1877 was before eminent lawyers and an elaborate opinion was rendered by them. They reached the conclusion that following the description in the charter of Charles I to Lord Baltimore, the right or south bank of the Potomac River, at high-water mark, was the boundary between Maryland and Virginia. This conclusion is in accordance with the one reached

by this court in the *Morris case,* in which case it was declared that the province of Maryland under the charter of Lord Baltimore embraced the Potomac River to high-water mark on the southern, or Virginia shore, and the court then declared that this title had not been divested by any valid proceedings prior to the Revolution, nor was it affected by the subsequent grant to Lord Culpeper, and therefore, as between the claimants under the old grant to Lord Baltimore and the one to Lord Culpeper, that the title of the claimants under the Baltimore grant embraced the Potomac River to high-water mark on the Virginia shore. But the arbitrators proceeding to establish the boundary between the States in the light of subsequent events, after referring to the effect of long occupation upon the rights of States and nations, and declaring that the length of time that raises a right by prescription in private parties likewise raises such a presumption in favor of States as well as private parties, took up the location of the boundary between the States along the Potomac River, and said:

*580 "The evidence is sufficient to show that Virginia, from * the earliest period of her history, used the South bank of the Potomac as if the soil to low water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers, (Potomac or Pocomoke) and all improvements which have or will be made thereon.' By the compact of 1785, Maryland assented to this, and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'

* * * * * * * * *

"Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

"To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, § 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privi-

*581 leges * reserved to the citizens of the respective States in the compact of 1785 and its subsequent ratifications indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia at low-water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also

consistent with the previous exercise of political jurisdiction by the States respectively.

The decree will therefore provide for the south bank of the Potomac River at low-water mark on the West Virginia shore as the true southern boundary line of the State of Maryland.

The other contention in the case concerns the costs of the surveys made by the surveyors of the respective States. It is the contention of Maryland that they should be equally divided, while West Virginia contends that each State should bear its own expense in this respect. An examination of the record shows that early in the proceedings in this case, on the twenty-sixth day of May, 1894, an order was entered by consent of parties, which authorized a survey to be made by surveyors to be agreed upon in writing by counsel for the respective States, said surveyor or surveyors to return to this court a report and map or maps made by him or them under the order, together with copies of such report, map or maps. The order provided for notice to be given attorneys for both parties of the time and place of commencing such surveys. Subsequently surveyors were designated, surveys were made and elaborate reports were filed in this court. Under these circumstances we are of opinion that the order heretofore made concerning the division of the costs should include the costs of such surveys. As was said by this court in *Nebraska* v. *Iowa,* 143 U. S.
*582 359, 370, * in making an order for a division of costs between the two States in a boundary dispute, the matter involved is governmental in character, in which each party has a real and yet not a litigious interest. The object to be obtained is the settlement of a boundary line between sovereign States in the interest, not only of property rights, but also in promotion of the peace and good order of the communities, and is one which the States have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, and we therefore adopt so much of the decree proposed by the State of Maryland as makes provision for the costs of the surveys made under the order of this court.

We append the decree to be entered:

Decree

This cause came on to be heard at this term and was argued by counsel; and thereupon, on consideration thereof, it was adjudged and decreed as follows:

First. That the true boundary line between the States of Maryland and West Virginia is ascertained and established as follows:

Beginning at the common corner of the States of Maryland and Virginia on the southern bank of the Potomac River at low-water mark at or near the mouth of the Shenandoah River, (near Harper's Ferry,) and running thence with the southern bank of the said Potomac River, at low-water mark, and with the southern bank of the North Branch of the Potomac River at low-water mark, to the point where the north and south line from the Fairfax Stone crosses the said North Branch of the Potomac, and thence running northerly, as near as may be, with the Deakins or Old State line to the line of the State of Pennsylvania.

*583 Second. That Julius K. Monroe, William McCulloch * Brown and Samuel S. Gannett be, and they are hereby, appointed commissioners to run,

locate and establish and permanently mark with suitable monuments the said Deakins or Old State line as the boundary line between the States of Maryland and West Virginia from said point on the southern bank of the North Branch of the Potomac River to the said Pennsylvania line, in accordance with the opinion of this court heretofore filed in this case and with this decree, the said line to be run and located as far as practicable as it has been generally recognized and adopted by the people residing about or near the same as the boundary line between the said States, and not as conforming, except to a limited extent, to the western boundary of the Maryland Military Lots as said lots are now located and held. Said commissioners shall mark said line as run, located and established by them with suitable stone monuments, at reasonable and proper intervals, according to the topography of the country.

It is further ordered that before entering upon the discharge of their duties each of said commissioners shall be duly sworn to perform faithfully, impartially and without prejudice or bias the duties herein imposed; said oath to be taken before the clerk of this court, or before either of the clerks of the Circuit Courts of the United States for the District of Maryland or for the Northern District of West Virginia, or before an officer authorized by law to administer an oath in the State of Maryland or of West Virginia, and returned with their report; that said commissioners may arrange for their organization, their meetings and the particular manner of the performance of their duties, and are authorized to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line, including the taking of evidence under oath and calling for papers and documents, but in the event evidence is taken the parties shall be notified and permitted to be present and cross-exam-
*584 ine * the witnesses; and all evidence taken by the commissioners and all exceptions thereto and action thereon shall be preserved and certified and returned with their report.

Said commissioners are also at liberty to refer to and consult the printed record in the cause so far as they may think proper to enable them to discharge their duties under this decree.

It is further ordered that the clerk of this court shall at once forward to the governor of each of said States of Maryland and West Virginia, and to each of the commissioners appointed by this decree, a copy of this decree duly authenticated. And said commissioners are authorized, if they deem it necessary, to request the cooperation and assistance of the State authorities in the performance of the duties imposed on them by this decree.

It is further ordered that said commissioners do proceed, with all convenient dispatch, to discharge their duties in running, locating, establishing and marking said line as herein directed, and make their report thereof and of their proceedings in the premises to this court on or before the first day of January, 1911, together with a complete bill of costs and charges annexed.

It is further ordered that should vacancies occur in said board of commissioners by reason of death, the refusal to act or inability to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint other commissioners to supply such vacancies, and said Chief Justice is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all the costs of the proceedings by said commissioners under this decree, including a remuneration of not exceeding fifteen dollars ($15.00) per day and his reasonable expenses for each commissioner whilst actually engaged in the performance of his duties * hereunder, and the other costs incident to the running, locating, establishing and marking said line, shall be paid by the States of Maryland and West Virginia equally.

*585

Third. That the cross bill of the State of West Virginia, in so far as it asks for a decree fixing the north bank of the Potomac River as the boundary line between said States, be, and the same is, hereby dismissed.

Fourth. That this decree shall not be construed as abrogating or setting aside the compact made between commissioners of the State of Maryland and the State of Virginia at Mount Vernon on the 28th day of March, 1785, and which was confirmed by the general assembly of Maryland and afterwards by act of the general assembly of Virginia passed on the 3rd day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the United States, or may be inconsistent with this decree, shall remain obligatory upon and between the States of Maryland and West Virginia, so far as it is applicable to that part of the Potomac River which extends along the border of said States, as ascertained and established by this decree.

Fifth. That all the costs in this case and the proceedings therein as the same shall be taxed by the clerk of this court, and including also the costs of the surveys made by the two States under the order or orders of this court, said costs for said surveys to be ascertained and taxed by the clerk of this court upon vouchers sworn to and exhibited to him, shall be equally divided between the said two States.[1]

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1911.

[220 *United States,* 1.]

A suit brought by one State against another, formed by its consent from its territory, to determine what proportion the latter should pay of indebtedness of the former at the time of separation, is a quasi-international controversy and should be considered in an untechnical spirit. In such a controversy there is no municipal code governing the matter and this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone.

A State is superior to the forms that it may require of its citizens; and where a part of a State separates and is created into a new State, a contract can be created by the constitutive ordinance of the parent State followed by the creation of the contemplated State.

A provision of the constitution of a new State, which is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent

[1] For the final phase of this case see *Maryland* v. *West Virginia* (225 U. S. 1), *post,* p. 1670.—Editor.

State and by Congress as embodying a just term which conditions the parent's consent, amounts to a contract.

In this case, the ordinance of Virginia, the constitution of West Virginia, and the act of Congress admitting West Virginia into the Union, when taken together, establish a contract that West Virginia will pay her share of the debt of Virginia existing at the time of separation.

*2 *Where all expenditures for which the debt of a State is created have the ultimate good of the whole State in view, the whole State, and not the particular locality in which the improvements are made, should equally bear the burden; and so *held* in apportioning the debt of Virginia between that State and West Virginia, that the latter should bear its share of the debt so created.

Provisions in the constitution of one State which is a party to a contract with another State cannot be taken as the sole guide to determine obligations under the contract.

What is just and equitable under a contract between States is a judicial question within the competence of this tribunal to decide.

A state may, by suit in this court, enforce against another State a contract in the performance of which the honor and credit of the plaintiff State is concerned. *New Hampshire* v. *Louisiana,* 108 U. S. 76, distinguished.

The liability assumed by West Virginia to bear a fair proportion of the debt of Virginia is a deep-seated equity not discharged by the fact that the creditors of Virginia may have released that State from the obligation of the portion to be assumed by West Virginia as ultimately determined; and Virginia may maintain a suit in this court to determine the liability of West Virginia even if the proceeds are to be applied to those holding certificates on which Virginia is no longer liable.

In apportioning the debt of Virginia between that State and West Virginia, the court rejects other methods proposed and adopts the ratio determined by the master's estimated valuation of real and personal property of the two States at the date of separation.

The value of slaves is properly excluded from such valuation.

There are many elements to be considered in determining the liability for interest by a newly created State on its share of the debt of the parent State, and this court will, before passing on that question in a suit of this nature, afford the parties an opportunity to adjust it between themselves.

A suit between States to apportion debt is a quasi-international controversy involving the honor and constitutional obligation of great States, which have a temper superior to that of private litigants; and, when this court has decided enough, patriotism, fraternity of the Union and mutual consideration should bring the controversy to an end.

THE facts, which involve the adjustment between Virginia and West
*3 Virginia of the debt of Virginia at the time * of the formation of the State of West Virginia, are stated in the opinion.

Mr. Samuel W. Williams, Attorney General of Virginia, *Mr. William A. Anderson, Mr. Randolph Harrison* and *Mr. John B. Moon* for Virginia:

The insista[e]nce of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to be ascertained under the Wheeling ordinance construed so as not to defeat the expressed controlling purpose of its enactment, and qualified and ruled by the provisions of Article VIII of the West Virginia constitution, upon which the consent of the legislature of Virginia and of the Congress of the United States to the formation of the new State was predicated.

Agreeably to the decision of this court in its opinion, delivered by the late Chief Justice, the view of Virginia is, and has been, that the ordinance and the

provisions of the West Virginia constitution, should be read as being in *pari materia;* but that the constitutional provision, being the latest, must prevail, if, and whenever there is any conflict between them.

Under paragraph 1 of the master's report, the public debt of the Commonwealth of Virginia as of January 1, 1861, is ascertained to be $33,897,073.82. The only controverted questions which have arisen under this paragraph have been as to the inclusion of the bonds of the Commonwealth, held by her Sinking Fund Board, and her Literary Fund Board, as part of the public debt. Virginia withdraws her objections to the master's action in excluding these bonds from the amount of the public debt.

Under paragraph 2 of the master's report, "the extent and assessed valuation of the territory of Virginia and of West Virginia, June 20, 1863, and the population thereof, with and without slaves, separately," as ascertained and reported by the master, are acceptable to Virginia.

*4 * Under paragraph 3 of the master's report, he has reported "all expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted."

This is one of the accounts which is called for under § 9 of the Wheeling ordinance. The only questions to be considered in determining whether any particular expenditure made during that period should be charged against West Virginia, are: First, Was it made by Virginia, and Second, Was the money expended in West Virginia? The expenditures made in West Virginia in the construction of the Covington & Ohio Railroad, amounting to $1,146,460.42, are allowed by the master, but this allowance is objected to by West Virginia on the ground that by reason of the public acts and transactions of Virginia and West Virginia, in reference to this railroad, Virginia has lost her right to have those expenditures charged against West Virginia.

The Wheeling ordinance prescribed the basis on which the proportion of the Virginia debt to be assumed by West Virginia was to be ascertained and vested in the new State the ownership of the portion of the Covington & Ohio Railroad located in Virginia, and there is nothing in the concurrent acts of the two States, in reference to the Covington & Ohio Railroad, which repeals or modifies the provisions of that ordinance.

The master rejected, as proper charges against West Virginia, all expenditures made by Virginia in West Virginia territory in the construction of works of internal improvement located in West Virginia, but built through the agency of joint stock companies.

The master erred in the rejection of those items of the account against West Virginia. Paragraph 3 of the decree, closely following the terms of the Wheeling ordinance, directs the master to ascertain and report *"all*

*5 * *expenditures* made by the Commonwealth of Virginia within the territory now constituting West Virginia." The ground relied on for excluding these items from the debit account against West Virginia is, because of the manner in which the expenditures were made; that is, because they were not made by the State directly, through her own officers or employés, but were made through the medium of joint stock companies. There is no such qualification of the expenditures which are to be charged, either in the decree or in the ordinance. The words "direct" or "indirect" are not found in either the decree or in the ordinance. No such classification is to be found in either the decree or in the ordinance.

The view which is here urged as to the expenditures of the Commonwealth in works of internal improvement constructed in West Virginia territory, and as to the classification of such of those expenditures as were made through the agency of joint stock companies, is the view heretofore consistently taken by

the representatives of West Virginia most familiar with the subject. The construction of the Wheeling ordinance in respect to the expenditures made by Virginia, through the agency of joint stock companies in the territory of West Virginia and adopted by public officials of West Virginia, remained unchallenged for more than a generation, and until this case, when this new and forced construction is attempted to be placed upon the Wheeling ordinance. We submit that this construction is not warranted, and that there is no authority for the master, under the language of the decree, which requires a report of all expenditures, to classify expenditures as "direct" and "indirect."

The fourth paragraph of the decree directs the master to ascertain "such proportion of the ordinary expenses of the government of Virginia, since any of said debt was contracted, as was properly assignable to the counties
*6 which were created into the State of West Virginia on the * basis of the average total population of Virginia, with or without slaves, as shown by the census of the United States."

This inquiry is manifestly predicated upon the language of the Wheeling ordinance, which provides that the new State shall be charged with "a just proportion of the ordinary expense of the state government, since any part of the said debt was contracted."

Nor are the ordinary expenses of a state government merely those which are necessary and regular in their occurrence, but quite as largely such as are usual, though not periodical, and such as are appropriate though not essential to the needs and aspirations of an enlightened and progressive people, and as are lawful.

In a modern State, and particularly in a State of the American Union, caring for, conserving and promoting the economic and material, as well as the social, sanitary, physical, intellectual and moral welfare of its people, many expenditures which may not be regarded as strictly governmental, and some which may not be absolutely necessary, are proper, lawful, usual and ordinary.

Under the decree the master was directed to ascertain and report "such proportion of the ordinary expenses of the government of Virginia since any of the debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia, on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

This paragraph is clearly in the alternative with the last clause of paragraph 4. The land assessments in Virginia were made in 1856, seven years before June, 1863, at which latter date at least four-fifths of the present territory of Virginia and one-fifth of the present territory of West Virginia had been ravaged and desolated by war, so that the valuation in 1856 afforded no
*7 just measure of * value in 1863. The lands were assessed as of their cash value in 1856. The personal property in Virginia counties was assessed annually on the first of February of each year, as of its then value, in the currency which then constituted the medium of exchange and the standard of value. The currency in 1863, with reference to which, as a standard of value, all their transactions were conducted was the depreciated currency of the Confederate States. The market values of all property, real and personal, in Confederate Virginia, was throughout 1863, fictitiously enhanced by reason of the depreciation of the currency in circulation in those regions, in which currency alone those values were measured. The uncontradicted evidence in the case show that the depreciation in value extended not only to slaves, but to all personal property, and was at least fifty per cent as a minimum.

The sixth paragraph of the decree directs the master to ascertain all money

paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

The defendant objects to the master's findings under this head because he fails to give West Virginia credit for certain items.

The master's findings upon these items is evidently justified by the facts, and is consistent with the language of the decree and of the Wheeling ordinance.

The amounts received by Virginia upon the accounts and items objected to by defendant, particularly the dividends upon bank stock, were in no sense money paid into the treasury of the Commonwealth from the counties included in the State of West Virginia. They were profits earned by Virginia's own money which she had invested in fiscal institutions, and not money paid to Virginia from West Virginian counties, within the meaning or within the
*8 reason of the sixth paragraph of the decree, or * of the ninth section of the Wheeling ordinance, on which that paragraph is based.

The seventh paragraph of the decree directs an account ascertaining "the amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items, and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof."

This direction of the decree was doubtless given in response to the provisions of §§ 1, 2 and 5 of the act of the Wheeling legislature passed February 3, 1863. There were large amounts of property, chiefly unappropriated, abandoned, and delinquent and forfeited lands to which the Commonwealth had title, which passed to the new State by the said act of the Wheeling legislature and with the value of which property West Virginia was chargeable by the terms of that act, upon such settlement as should be had between the two States.

It was found to be impracticable to obtain satisfactory evidence of the disposition which had been made by the new State of large quantities of land, delinquent and forfeited to the Commonwealth prior to June, 1863. So that the only charges made by Virginia under the seventh paragraph of the decree are for money and bank stocks actually received by West Virginia from Virginia, after the formation of the new State in 1863 and 1864.

West Virginia received from the Commonwealth amounts aggregating $170,771.46, as assented to and certified by the accountants of both parties, and is reported by the master at page 181 of his report. Under these circumstances it is difficult to understand upon what ground the master excluded these items amounting to $170,771.46, as to which the facts are unquestionable.
*9 * These sums of money were undoubtedly received by the new from the old State. At that time the officials of the restored government of Virginia were West Virginians. That government dominated by West Virginians and the new State of West Virginia could appropriate and take out of the treasury of the State of Virginia at Wheeling, whatever it chose, and it did undoubtedly receive from the restored government of Virginia $170,771.46 for which sum it is properly chargeable.

What should West Virginia pay? What is West Virginia's share of the debt?

There can be no question but that the provisions of Article 8, § 8 of the West Virginia constitution, the act of Virginia and the act of Congress created a compact, and that the provisions of the constitution constituted an essential

stipulation and condition upon which the consent of the legislature of Virginia to the creation of the new State was predicated. The Congress of the United States would never have given its consent to the partition of Virginia, and the erection of the new State out of her domain, but for the fact that the new State had undertaken to assume an equitable proportion of the then existing debt of the Commonwealth of Virginia, and pay the same with interest thereon.

As to the liability of West Virginia for interest; the contract here considered was a Virginia contract. Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due the debtor is bound to pay interest unless relieved from this obligation by agreement. "The interest follows the principal as the shadow does the substance." The decisions of the highest court in West Virginia are in accord with the decisions of the Virginia courts. This rule is applied in Virginia to debts due by the Commonwealth. The framers of the Wheeling ordinance must be presumed to have drawn that instrument * with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest courts.

*10

The language of the Wheeling ordinance is that "The new State shall take upon herself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," etc.

The debt of Virginia therein referred to was an interest-bearing debt. It was evidenced by the bonds of the Commonwealth, all of which, by the express terms of the obligations, bore interest, payable in the future.

The stipulation of West Virginia expressed in her constitution and accepted and acted upon by Virginia, was that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

The claim of Virginia is that West Virginia is bound both by the terms of the Wheeling ordinance and of her first constitution to pay a just and equitable part of this debt, with interest thereon until the same shall be fully paid, and that she shall not be suffered to repudiate either obligation.

Mr. Holmes Conrad, counsel for the bondholding creditors, appearing as *amicus curiæ:*

Counsel for bondholders dissents from the views expressed in the briefs and arguments of the Attorneys General of Virginia and West Virginia, respectively, as to the validity and application here of the ninth section of the Wheeling ordinance.

1. The ninth section of the ordinance was not "the basis upon which the consent of the Commonwealth of Virginia was given to the formation of the new State." Such ninth section was never, for one instant of time, recognized by any convention or legislature as having * any binding force upon either State or person, and that as a proposition made by Virginia to West Virginia it was never accepted by the latter State.

*11

2. The ninth section was not "a stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given and which was afterwards accepted and assented to by the people of West Virginia."

3. It was not "a contractual or a fundamental provision, and it did not constitute a primary obligation, or lie at the foundation of the right of West Virginia to be a State."

West Virginia became a State by being admitted into the Union by the Congress of the United States, upon the consent, first obtained, of the restored State of Virginia, and such consent, in its express terms, referred to the con-

stitution framed for West Virginia, and did not by expression or implication refer to the ordinance or to any of its provisions.

4. The "basis of settlement prescribed by the Wheeling ordinance," whether taken alone or in connection with any legislation or constitutional provision, was never binding "on both States" or on either State.

It was not referred to in the case of *Virginia* v. *West Virginia,* 11 Wall. 39, and, as shown by Mr. Faulkner, the counsel for West Virginia in that case, had no relevancy or connection with the line of argument taken by either the counsel or the court in that case.

The bondholding creditors, whose interests this court has allowed to be represented here, are creditors of Virginia and of West Virginia alike. They are not formal parties to this cause, but their interests are fully recognized and secured by the several acts of the General Assembly of Virginia, which form part of this record, and under which Virginia has received and holds the bonds deposited by them, as a trustee, as to the unfunded one-third of the amounts of such bonds.

*12 * On the part of the bondholding creditors, it is insisted that the only just and reasonable plan for ascertaining the proportion of the debt proper to be borne by West Virginia, is that stated and approved by the writers on international or public law, and which was adopted by this court, in its opinion, delivered by Mr. Justice Field, in *Hartman* v. *Greenhow,* 102 U. S. 672.

Both on the ground of international law, and on the express provision of the constitution of the State, under which Congress admitted it into the Union, the liability of West Virginia, for an equitable proportion of the public debt of Virginia, appears to be inevitable.

The bonds evidencing the public debt of Virginia, prior to the first day of January, 1861, and deposited by the holders thereof, with the Commonwealth of Virginia, under the provisions of the several funding acts, were not cancelled or extinguished as to the one-third of the amount thereof, estimated to be the equitable proportion of such debt to be borne by the State of West Virginia.

The Commonwealth of Virginia has never been discharged from liability on the bonds issued by her prior to January 1, 1861, except as to the extent of the two-thirds of the amount thereof for which amount the holders surrendered them, as to such two-thirds, and received in lieu thereof the new bonds of the Commonwealth.

The Wheeling ordinance, as shown by its title, was "to provide for the formation of a new State, out of a portion of the territory of this State." All of its sections, except the ninth, were directed to that end. The State was formed when its constitution was framed and adopted by its people. The ordinance then became *functus officio,* and ceased to have any operation. The ninth section, as contended by counsel for West Virginia, was a proposition made by Virginia and tendered to West Virginia.

West Virginia's time for accepting it, was when she was assembled in *13 convention in November, 1861; then, and * only then, while she was framing her constitution could she have signified her acceptance of the proposition, by embodying it in her constitution. She did not embody it. She embodied something altogether different, and made no reference to the ninth section of the Wheeling ordinance.

A "plan by which the new State should ascertain her just proportion of the public debt of Virginia" was not a matter as to which the parent State, Virginia, could prescribe or dictate terms to the new State. In none of the compacts made by States does it appear that the parent State has ever sought or been allowed to impose on the new State any such burdens, limitations or

conditions, as were not immediately connected with the territory ceded to the new State. The extent of such territory, its boundaries, and the rights and assessments incident thereto, and these only, can be the subject-matters of such compacts. All other matters fall within the domestic power and control of the new State.

At no time and in no manner did West Virginia ever accept the proposition contained in the ninth section of the Wheeling ordinance. The provision made by West Virginia in her constitution was not an acceptance of the ninth section of the Wheeling ordinance. It differed in its most material features from that section. Acceptance of a proposition must be absolute and unconditional without the omission or addition of a single term.

The method of ascertainment proposed by the ninth section of the ordinance cannot be accepted as a proper plan for ascertaining West Virginia's just proportion of the public debt of Virginia, because—as the master has found in his report—"The Wheeling ordinance is not predicated upon the *amount* of the public debt," and counsel for West Virginia have repeatedly stated that

*14 "the ninth section of the ordinance has no relation to the amount of the public debt of Virginia," etc. "The amount of the * Virginia debt is not a factor to be taken into consideration in ascertaining West Virginia's just proportion."

The "just proportion" of an amount cannot be ascertained without knowing the *amount* itself.

The convention that framed the constitution for the proposed new State did not regard itself as bound by any suggestions offered by the Wheeling ordinance. It either ignored or repudiated the suggestion made as to the name of the new State, and also as to the plan for ascertaining the proper proportion of the public debt of Virginia to be borne by West Virginia.

The act of Congress of December 31, 1862, admitting the State of West Virginia into the Union, did not refer to the Wheeling ordinance, but did refer only to the act of the Virginia legislature and to the constitution adopted by West Virginia.

The act of the legislature of Virginia giving consent to the erection of the new State within its territory did not refer to the Wheeling ordinance, and her consent was not given on any condition, either express or implied, that the ordinance or any of its provisions should form a compact between the two States, but such consent was given to the formation of the new State according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, proposed by the convention which assembled in Wheeling on November 26, 1861.

The Wheeling ordinance was adopted by a convention which sat in August, 1861, and the purpose of the Virginia legislature appears to have been to exclude the inference that it referred in any way to the acts of that convention.

Mr. Charles E. Hogg, Mr. George W. McClintic and *Mr. John C. Spooner,* with whom *Mr. William G. Conley,* Attorney General of the State of West

*15 Virginia, *Mr. * Wm. Mollohan, Mr. Wm. M. O. Dawson* and *Mr. W. G. Matthews* were on the brief, for West Virginia:

When the great transactions occurred which are under review, the Confederate States of America had been formed. Ordinances of secession had been passed by South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana. Virginia had passed an ordinance of secession, had borrowed $1,000.000, had called for 10,000 men to serve for twelve months and has[d] arranged with the Confederate government for admission to the Confederacy, and in the meantime that her troops should, under the Confederate government, be employed against the United States.

Her troops had seized the Norfolk and Gosport Navy Yards, the arsenal at Harper's Ferry, the Customs Houses, and other property of the United States within her borders; had hauled down the flag of the United States and hoisted in its place another. President Buchanan in a message to Congress had taken the position that there was no power in the Federal Government under the Constitution to coerce a State. Fort Sumter had been surrendered.

President Lincoln had called for 75,000 troops to serve three months. The battle of Bull Run had been fought in which the Federal troops were disastrously defeated. The "New York Tribune," edited by Mr. Greeley, exercising a most potent influence upon public opinion, advocated a peaceful separation of the States determined to withdraw, and many eminent men of undoubted love for the Union in both parties seemed to be of the same opinion. There was grave doubt throughout the country as to the ultimate result. The people of West Virginia could not be blind to the fact that if the Confederacy should be established, that territory would, unless action were taken, be irrevocably a part of that Confederacy.

*16 Isolated from eastern Virginia, and differing in sentiment * from her people in respect to the right of secession and the institution of slavery, her people are not to be justly chided here or elsewhere for embracing that opportunity to become a State in the Union. In this situation, is to be found the genesis of West Virginia; and in the light of this situation, her people are to be judged and her compacts and "constating" instruments are to be construed.

This court has never decided that when a State is divided the debts of the original State should be ratably apportioned between it and the new State. That question was not involved in or decided by either *Hartman* v. *Greenhow,* 102 U. S. 672, or *Antoni* v. *Greenhow,* 107 U. S. 769.

The true rule of public law in case of the division of a State is that general debts are apportioned on the basis of taxable value. Local debts are assumed by the State for the exclusive benefit of whose territory they were incurred. See Hall's International Law, 78, 80. No rule of international law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon its successor. See also Treaty of Berlin of 1878, and Huber, Nos. 125–135 and 205; Oppenheim's Int. Law, § 84; and Glenn's Int. Law, 36. As to the effect of change of sovereignty upon the public rights and obligations, see Hannis Taylor, Int. Law, §§ 166, 168. Pradier Fodéré, in "Traité de Droit International Public," Vol. 1, § 156, states that the state to which cession is made is bound by local debts of ceded territory.

Bluntschli says, § 59, that the debts of the state ought not to be divided proportionately to the population, but that the taxes furnish a juster basis. Bonfils, 3d ed., §§ 223–226, limits the liability exclusively to the debts contracted for the exclusive benefit of its territory, and makes taxation the basis.

*17 *Franz* v. *Liszt,* University of * Berlin, 2d ed., Berlin, 1902, § 23, p. 175, takes the same view; see also Piédelièvre, Paris, 1894, §§ 154, 155. The proportion of the debt to be borne should be determined in accordance with the relative wealth of the detached portion and of the remainder of the dismembered state, and this wealth is disclosed by the taxes. Alphonse Rivier, Paris, 1826, Vol. 1, p. 213 (Art. 40, V).

Pasquale Fiore, Int. Law, § 132, of his codified Int. Law, § 360 of Noveau Droit International, says that Bluntschli is correct, that the apportionment should not be made proportionally to population, but apportioned proportionally to the taxes. Pradier Fodéré, §§ 156, 157, states that the state to which cession is made is bound by local debts of ceded territory, citing as instances the acquisition of Lombardy and Venice by Italy, and the Alsace-Lorraine cession

of 1871, as the general rule, to which the treaty of Berlin of 1878, imposing part of the public Turkish debt upon Bulgaria, Montenegro, Servia, was an exception.

Max Huber, on Staatensuccession (1898), says, pp. 90–92, § 34, that the division *pro rata regiionis* has no reasonable basis, and on p. 96 limits the assumption to special debts; see also § 272, as to debts incurred in the interest of the particular domain. See also Henri Appleton on Annexation and Debts, Paris, 1895, Ch. IV, § II, 65–67.

Even if the court should be of opinion that the rule of international law does not govern the present case, yet if the court, apart from the method prescribed by the ordinance and notwithstanding the provision in the constitution of West Virginia referring the matter for ascertainment to the legislature of that State, should undertake to determine the equitable proportion of the old Virginia debt which West Virginia should assume, it cannot fail to give great weight to the authorities on international law which we have cited. The rules of international law are * based entirely upon considerations of equity and fairness. They have no force nor sanction except from the consent of nations by reason of their evident justice. This court, therefore, in determining what would be an equitable apportionment of the Virginia debt, would undoubtedly desire to take into most careful consideration the unanimous opinion of the modern international law authorities that, in apportioning the debt of a state after its division, equity requires a distinction to be made between the portion of the debt which is local or special in its character and that which is general, so that the parent state and the new state are bound respectively to assume the whole of the local debts relating to their respective territories, leaving only the general debt to be apportioned on the basis of taxable value.

*18

The distinction between general and local debts was recognized in the division of territory of Dakota. Act of Congress of Feby. 22, 1889 § 6, 25 U. S. Stat. 682.

The distinction between general and special debt was discussed in negotiation of treaty between United States and Spain. The American commissioners recognized the distinction, but refused to accede to the demand of Spain, upon the ground that Cuba had had no debt, but, on the contrary, had been a self-supporting colony, and the commissioners considered that the indebtedness was incurred, and its proceeds used, to wage war upon Cuba and to resist by arms the aspirations and struggles of her people to be freed from long-continued despotism and misrule and that the debt was, therefore, a part of Spain's national or general debt.

If we had taken over Cuba in the absence of strife between Cuba and Spain and the United States and Spain, and there had been found an indebtedness incurred by Spain, the proceeds of which had been expended in public improvements in Cuba and for the benefit and betterment of the island and its inhabitants, the question would have * been a different one, and from the standpoint of international law and justice, our attitude must have been different.

*19

The distinction between general debt and local debt is substantial and just and rests upon a sound principle.

The public debt of Virginia prior to January 1, 1861, was a local or special and not a general debt.

In respect of all of the debt, the proceeds of which were expended in West Virginia, the schedule shows that the loans which she effected were numbered as required by law, the certificate of debt or certificates of debt, referring to the act which authorized the particular expenditure, so that it is not only true that the debt represents expenditures for internal improvements, but it is true, so

far as the expenditures in West Virginia were concerned, that the moneys which were expended, the proceeds of loans, are traceable to the particular improvements and the stocks and dividends thereon were pledged for the repayment of the loan.

The rule of public law does not govern this case because the Wheeling ordinance and the constitution of West Virginia constitute a special agreement as to the proportion of the old Virginia debt to be assumed by West Virginia.

Virginia is not in a position to insist upon the elimination of the ordinance from the case. Virginia does not contend that the ordinance has ceased to be binding. There is no conflict between the ordinance and the constitution; the latter was adopted within ninety days of the former. The constitutional provision was silent as to method. There was no occasion for repeating in it the language of the ordinance so recently adopted as to the ordinance being a compact. See *Virginia* v. *West Virginia,* 11 Wall. 39; and as to whether Congress consented to it, see *Virginia* v. *Tennessee,* 148 U. S. 503; *Wedding* v.
*20 * *Meyler,* 192 U. S. 582. It certainly was a compact, and wherever it was not carried into the constitution, it remains binding as such.

When the Congress admitted West Virginia into the Union, there were two States, and the ordinance so far as it was not merged into the constitution, was a compact binding from the beginning.

The vice in the argument for Virginia is in the assumption that the ordinance is to be read as if it consisted only of these words: The new State shall take upon itself a just proportion of the public debt of Virginia prior to the first of January, 1861. The ordinance was not confined to the debt.

"Just" and "equitable" are synonymous. See Webster; "1. Justice, right."

If the ordinance is in conflict with the constitution the ordinance must be wholly eliminated; and with the ordinance eliminated the ascertainment of West Virginia's proportion of the debt must be left to the legislature of West Virginia. What proportion of the debt of a county or a city or a town which is divided by legislative authority, shall be borne by the portion set off to make a new town, or included within the boundaries of another county, city or town, is a legislative question and not a judicial one. *Laramie Co.* v. *Albany Co.,* 92 U. S. 307; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514. If the legislature of West Virginia has failed, with or without justification, to discharge the duty imposed upon it by the constitution, the matter was left by the legislature of Virginia and by the Congress to the honor of the legislature of West Virginia. There is no recourse to courts. With the ordinance eliminated the matter is not justiciable. *Tulare County* v. *Kings County,* 117 California, 195; *Los Angeles County* v. *Orange County,* 97 California, 329; *Taylor* v. *Brewer,* 1 Maule & Selwin, 290; and *Cummer* v. *Butts,* 40 Michigan, 322.
*21 * This court, however, has declared that the ordinance and the constitution do not conflict and are to be read in *pari materia.* See former opinion in this case, 206 U. S. 290, 319.

The master was right in holding that bonds held by the Sinking Fund and by the Literary Fund were not a part of the public debt of Virginia. *Board of Public Works* v. *Gannt,* 76 Virginia, 465; *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz,* 107 U. S. 711.

The master was right in excluding under paragraph III of the decree expenditures by corporations in which Virginia was a stockholder.

Virginia legislature and courts recognize the distinction between private corporations with stock and public corporations without stock. *Sayre* v. *The Northwestern Turnpike Road,* 10 Leigh, 454.

The master was wrong in finding that interest on the public debt of Virginia was part of the ordinary expenses of the state government.

Interest on a state debt is not an ordinary expense of government because it is payable only during a limited period.

Interest on the old Virginia debt was not an ordinary expense of government because the debt was incurred for extraordinary purposes.

West Virginia is not bound to pay interest from January 1, 1861, on the proportion of the old Virginia debt assumed by her.

There is no basis for Virginia's claim for interest. *Commonwealth* v. *Marston's Administrator,* 9 Leigh, 36.

Neither by the ordinance nor by her constitution did West Virginia *in præsenti* assume any portion of the public debt of Virginia.

The Virginia rule as to private contracts that interest follows the principal does not and cannot apply to contracts between sovereign States. *Higgin-*
*22 *botham's Executrix* * v. *Commonwealth,* 25 Grattan, 627, does not apply in this case.

United States v. *North Carolina,* 136 U. S. 211, holds that interest is not to be awarded against a sovereign government, unless its consent to pay interest has been clearly manifested by an act of its legislature, or by a lawful contract of its executive officers. Citing *United States* v. *Sherman,* 98 U. S. 565; *Angarica* v. *Bayard,* 127 U. S. 251, 260.

West Virginia did not agree to assume a just proportion of all the outstanding obligations of Virginia, but only of her debt.

There is no evidence that the improvements constructed by Virginia within her present limits were for the benefit of the region now West Virginia.

Under the ordinance and her constitution West Virginia cannot be charged with interest until after the ascertainment, in the manner prescribed, of her equitable proportion of the old Virginia debt.

If there had been any intent to assume, or pay, the accrued interest on the bonds of Virginia, outstanding, the constitution would have so expressed it.

Following the principle announced in *United States* v. *North Carolina,* 136 U. S. 211, many of the state courts have laid down in distinct terms the same proposition. *Sawyer* v. *Colgan,* 102 Florida, 293; *Hawkins* v. *Mitchell,* 34 Florida, 421; *Molineaux* v. *State,* 109 Florida, 380; *Flint &c. R. R. Co.* v. *State Auditors,* 102 Michigan, 502; *Carr* v. *State,* 127 Indiana, 204; *S. C.,* 22 Am. St. Rep. 624, note, p. 448.

Virginia alone is responsible for the delay in apportioning the debt and West Virginia cannot be charged with that delay.

Mr. Justice Holmes delivered the opinion of the court.

*23 This is a bill brought by the Commonwealth of Virginia * to have the State of West Virginia's proportion of the public debt of Virginia as it stood before 1861 ascertained and satisfied. The bill was set forth when the case was before this court on demurrer. 206 U. S. 290. Nothing turns on the form or contents of it. The object has been stated. The bill alleges the existence of a debt contracted between 1820 and 1861 in connection with internal improvements intended to develop the whole State, but with especial view to West Virginia, and carried through by the votes of the representatives of the West Virginia counties. It then sets forth the proceedings for the formation of a separate State and the material provisions of the ordinance adopted for that purpose at Wheeling on August 20, 1861, the passage of an act of Congress for the admission of the new State under a constitution that had been adopted, and the admission of West Virginia into the Union, all of which we shall show more fully a little further on. Then follows an averment of the transfer in 1863 to West Virginia of the property within her boundaries belonging to West Vir-

ginia, to be accounted for in the settlement thereafter to be made with the last-named State. As West Virginia gets the benefit of this property without an accounting, on the principles of this decision, it needs not to be mentioned in more detail. A further appropriation to West Virginia is alleged of $150,000, together with unappropriated balances, subject to accounting for the surplus on hand received from counties outside of the new State. Then follows an argumentative averment of a contract in the constitution of West Virginia to assume an equitable proportion of the above-mentioned public debt, as hereafter will be explained. Attempts between 1865 and 1872 to ascertain the two States' proportion of the debt and their failure are averred, and the subsequent legislation and action of Virginia in arranging with the bondholders, that will be explained hereafter so far as needs. Substantially all the bonds outstanding
*24 in 1861 * have been taken up. It is stated that both in area of territory and in population West Virginia was equal to about one-third of Virginia, that being the proportion that Virginia asserts to be the proper one for the division of the debt, and this claim is based upon the division of the State, upon the above-mentioned Wheeling ordinance and the constitution of the new State, upon the recognition of the liability by statute and resolution, and upon the receipt of property as has been stated above. After stating further efforts to bring about an adjustment and their failure, the bill prays for an accounting to ascertain the balance due to Virginia in her own right and as trustee for bondholders and an adjudication in accord with this result.

The answer admits a debt of about $33,000,000, but avers that the main object of the internal improvements in connection with which it was contracted was to afford outlets to the Ohio River on the west and to the seaboard on the east for the products of the eastern part of the State, and to develop the resources of that part, not those of what is now West Virginia. In aid of this conclusion it goes into some elaboration of details. It admits the proceedings for the separation of the State and refers to an act of May, 1862, consenting to the same, to which we also shall refer. It denies that it received property of more than a little value from Virginia or that West Virginia received more than belonged to her in the way of surplus revenue on hand when she was admitted to the Union, and denies that any liability for these items was assumed by her constitution. It sets forth in detail the proceedings looking to a settlement, but as they have no bearing upon our decision we do not dwell upon them. It admits the transactions of Virginia with the bondholders and sets up that they discharged the Commonwealth from one-third of its debt and that what
*25 may have been done as to two-thirds does not concern the defendant, * since Virginia admits that her share was not less than that. If the bonds outstanding in 1861 have been taken up it is only by the issue of new bonds for two-thirds and certificates to be paid by West Virginia alone for the other third. Liability for any payments by Virginia is denied and accountability, if any, is averred to be only on the principle of § 9 of the Wheeling ordinance, to be stated. It is set up further that under the constitution of West Virginia her equitable proportion can be established by her legislature alone, that the liquidation can be only in the way provided by that instrument, and hence that this suit cannot be maintained. The settlement by Virginia with her creditors also is pleaded as a bar, and that she brings this suit solely as trustee for them.

The grounds of the claim are matters of public history. After the Virginia ordinance of secession, citizens of the State who dissented from that ordinance organized a government that was recognized as the State of Virginia by the Government of the United States. Forthwith a convention of the restored State, as it was called, held at Wheeling, proceeded to carry out a long entertained wish of many West Virginians by adopting an ordinance for the formation of a new State out of the western portion of the old Commonwealth. A part of § 9 of the ordinance was as follows: "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new state during the said period." Having previously provided for a popular vote, a constitutional convention, etc., the ordinance in § 10 ordained that when the General
*26 Assembly should give * its consent to the formation of such new State, it should forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the new State might be admitted into the union of States.

A constitution was framed for the new State by a constitutional convention, as provided in the ordinance, on November 26, 1861, and was adopted. By Article 8, § 8, "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." An act of the legislature of the restored State of Virginia, passed May 13, 1862, gave the consent of that legislature to the erection of the new State "under the provisions set forth in the constitution for the said State of West Virginia." Finally Congress gave its sanction by an act of December 31, 1862, c. 6, 12 Stat. 633, which recited the framing and adoption of the West Virginia constitution and the consent given by the legislature of Virginia through the last mentioned act, as well as the request of the West Virginia convention and of the Virginia legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the act of Congress should take effect, and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a State on June 20, 1863.

It was held in 1870 that the foregoing constituted an agreement between the old State and the new, *Virginia* v. *West Virginia*, 11 Wall. 39, and so much
*27 may be taken * practically to have been decided again upon the demurrer in this case, although the demurrer was overruled without prejudice to any question. Indeed, so much is almost if not quite admitted in the answer. After the answer had been filed the cause was referred to a master by a decree made on May 4, 1908, 209 U. S. 514, 534, which provided for the ascertainment of the facts made the basis of apportionment by the original Wheeling ordinance, and also of other facts that would furnish an alternative method if that prescribed in the

Wheeling ordinance should not be followed; this again without prejudice to any question in the cause. The master has reported, the case has been heard upon the merits, and now is submitted to the decision of the court.

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. *Missouri* v. *Illinois,* 200 U. S. 496, 519, 520. *Kansas* v. *Colorado,* 206 U. S. 46, 82–84. Therefore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits, with which we proceed to deal. See *Rhode Island* v. *Massachusetts,* 14 Peters, 210, 257. *United States* v. *Beebe,* 127 U. S. 338.

The amount of the debt January 1, 1861, that we have to apportion no longer is in dispute. The master's finding was accepted by West Virginia and at the argument we understood Virginia not to press her exception that it should be enlarged by a disputed item. It was $33,897,073.82, the sum represented mainly by interest-bearing bonds. The first thing to be decided is what the final agreement was that was made between the two States. Here again we are not
*28 to be bound by technical * form. A State is superior to the forms that it may require of its citizens. But there would be no technical difficulty in making a contract by a constitutive ordinance if followed by the creation of the contemplated State. *Wedding* v. *Meyler,* 192 U. S. 573, 583. And, on the other hand, there is equally little difficulty in making a contract by the constitution of the new State, if it be apparent that the instrument is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent State and by Congress as embodying a just term which conditions the parent's consent. There can be no question that such was the case with West Virginia. As has been shown, the consent of the legislature of the restored State was a consent to the admission of West Virginia under the provisions set forth in the constitution for the would-be State, and Congress gave its sanction only on the footing of the same constitution and the consent of Virginia in the last-mentioned act. These three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.

We are of opinion that the contract established as we have said is not modified or affected in any practical way by the preliminary suggestions of the Wheeling ordinance. Neither the ordinance nor the special mode of ascertaining a just proportion of the debt that it puts forward is mentioned in the constitution of West Virginia, or in the act of Virginia giving her consent, or in the act of Congress by which West Virginia became a State. The ordinance
*29 * required that a copy of the new constitution should be laid before Congress, but said nothing about the ordinance itself. It is enough to refer to the circumstances in which the separation took place to show that Virginia is entitled to the benefit of any doubt so far as the construction of the contract is con-

cerned. See opinion of Attorney-General Bates to President Lincoln, 10 Op. Atty. Gen. 426. The mode of the Wheeling ordinance would not throw on West Virginia a proportion of the debt that would be just, as the ordinance requires, or equitable, according to the promise of the constitution, unless upon the assumption that interest on the public debt should be considered as part of the ordinary expenses referred to in its terms. That we believe would put upon West Virginia a larger obligation than the mode that we adopt, but we are of opinion that her share should be ascertained in a different way. All the modes, however, consistent with the plain contract of West Virginia, whether under the Wheeling ordinance or the constitution of that State, come out with surprisingly similar results.

It was argued, to be sure, that the debt of Virginia was incurred for local improvements and that in such a case, even apart from the ordinance, it should be divided according to the territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that two or three-fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one-fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State.

The parties interested in the investment were the same, wherever the sphere
*30 of corporate action might be. The whole State * would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand. If we should attempt to look farther, many of the corporations concerned were engaged in improvements that had West Virginia for their objective point, and we should be lost in futile detail if we should try to unravel in each instance the ultimate scope of the scheme. It would be unjust, however, to stop with the place where the first steps were taken and not to consider the purpose with which the enterprise was begun. All the expenditures had the ultimate good of the whole State in view. Therefore we adhere to our conclusion that West Virginia's share of the debt must be ascertained in a different way. In coming to it we do but apply against West Virginia the argument pressed on her behalf to exclude her liability under the Wheeling ordinance in like cases. By the ordinance West Virginia was to be charged with all state expenditures within the limits thereof. But she vigorously protested against being charged with any sum expended in the form of a purchase of stocks.

But again, it was argued that if this contract should be found to be what we have said, then the determination of a just proportion was left by the constitution to the legislature of West Virginia, and that irrespectively of the words of the instrument it was only by legislation that a just proportion could be fixed. These arguments do not impress us. The provision in the constitution of the State of West Virginia that the legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command

from supreme to subordinate authority to perform the promise as soon as
*31 might be and an indication of the way. Apart from * the language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in nowise beyond the competence of a tribunal to decide.

The ground now is clear, so far as the original contract between the two States is concerned. The effect of that is that West Virginia must bear her just and equitable proportion of the public debt as it was intimated in *Hartman* v. *Greenhow,* 102 U. S. 672, so long ago as 1880, that she should. It remains for us to consider such subsequent acts as may have affected the original liability or as may bear on the determination of the amount to be paid. On March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, passed an act authorizing an exchange of the outstanding bonds, etc., and providing for the funding of two-thirds of the debt with interest accrued to July 1, 1871, by the issue of new bonds bearing the same rate of interest as the old, six per cent. There were to be issued at the same time, for the other one-third, certificates of same date, setting forth the amount of the old bond that was not funded, that payment thereof with interest at the rate prescribed in the old bond would be provided for in accordance with such settlement as should be had between Virginia and West Virginia in regard to the public debt, and that Virginia held the old bonds in trust for the holder or his assignees. There were further details that need not be mentioned. The coupons of the new bonds were receivable for all taxes and demands due to the State. *Hartman* v. *Greenhow,* 102 U. S. 672. *McGahey* v. *Virginia,* 135 U. S. 662. The certificates issued to the public under this statute and outstanding amount to $12,703,451.79.

The burden under the statute of 1871 still being greater than Virginia felt able to bear, a new refunding act was passed on March 28, 1879, reducing the interest and providing that Virginia would negotiate or aid in negotiating
*32 * with West Virginia for the settlement of the claims of certificate holders and that the acceptance of certificates "for West Virginia's one third" under this act should be an absolute release of Virginia from all liability on account of the same. Few of these certificates were accepted. On February 14, 1882, another attempt was made, but without sufficient success to make it necessary to set forth the contents of the statute. The certificates for balances not represented by bonds, "constituting West Virginia's share of the old debt," stated that the balance was "to be accounted for by the state of West Virginia without recourse upon this commonwealth."

On February 20, 1892, a statute was passed which led to a settlement, described in the bill as final and satisfactory. This provided for the issue of bonds for nineteen million dollars in exchange for twenty-eight millions outstanding, not funded, the new bonds bearing interest at two per cent for the first ten years and three per cent for ninety years; and certificates in form similar to that just stated, in the act of 1882. On March 6, 1894, a joint resolution of the Senate and House of Delegates was passed, reciting the passage of the four above mentioned statutes, the provisions for certificates, and the satisfactory adjustment of the liabilities assumed by Virginia on account of two-thirds of the debt, and appointing a committee to negotiate with West Virginia, when satisfied that a majority of the certificate holders desired it and would accept the amount to be paid by West Virginia in full settlement of the one-third that Virginia had not assumed. The State was to be subjected to no expense. Finally an act of March 6, 1900, authorized the commission to receive and take on deposit the certificates, upon a contract that the certificate holders would accept the amount realized from West Virginia in full settlement of all their claims under the same.

It also authorized a suit if certain proportions of the certificate should be
*33 so deposited, * as since then they have been—the State, as before, to be subjected to no expense.

On January 9, 1906, the commission reported that apart from certificates held by the State and not entering into this account, there were outstanding of the certificates of 1871 in the hands of the public $12,703,451.79, as we have said, of which the commission held $10,851,294.09, and of other certificates there were in the hands of the public $2,778,239.80, of which the commission held $2,322,141.32.

On the foregoing facts a technical argument is pressed that Virginia has discharged herself of all liability as to one-third of the debt; that, therefore, she is without interest in this suit, and cannot maintain it on her own behalf; that she cannot maintain it as trustee for the certificate holders, *New Hampshire* v. *Louisiana*, 108 U. S. 76; and that the bill is multifarious in attempting to unite claims made by the plaintiff as such trustee with some others set up under the Wheeling ordinance, etc., which, in the view we take, it has not been necessary to mention or discuss. We shall assume it to be true for the purposes of our decision, although it may be open to debate, *Greenhow* v. *Vashon*, 81 Virginia, 336, 342, 343, that the certificate holders who have turned in their certificates, being much the greater number, as has been seen, by doing so, if not before, surrendered all claims under the original bonds or otherwise against Virginia to the extent of one-third of the debt. But even on that concession the argument seems to us unsound.

The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two States. If one-third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining
*34 * two-thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire* v. *Louisiana* into play. For even if Virginia is not liable she has the contract of West Virginia to bear an equitable share of the whole debt, a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See *United States* v. *Beebe*, 127 U. S. 338, 342. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125, 126. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his *cestui que trust*. *Lloyd's* v. *Harper*, 16 Ch. D. 290, 309, 315. *Lamb* v. *Vice*, 6 M. & W. 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.

It remains true then, notwithstanding all the transactions between the old Commonwealth and her bondholders, that West Virginia must bear her equitable proportion of the whole debt. With a qualification which we shall mention in

a moment, we are of opinion that the nearest approach to justice that we can make is to adopt a ratio determined by the master's estimated valuation of the real and personal property of the two States on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger
*35 share on West Virginia, but the relative resources of the * debtor populations are generally recognized, we think, as affording a proper measure. It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia $300,887,367.74, and for West Virginia $92,416,021.65. These figures are criticised by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia cannot complain of the result. They would give the proportion in which the $33,897,073.82 was to be divided, but for a correction which Virginia has made necessary. Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt, whereas at the ratio shown by the figures her share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the creditors were content to accept from her, say $22,598,049.21, is $3,333,212.26; subtracting the last sum from the debt leaves $30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have $7,182,507.46 as her share of the principal debt.

We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a final decree there would be figures to be agreed upon or to be ascertained by reference to a master. Among other things there still remains the question of interest. Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on
*36 the other. The circumstances of the asserted default and * the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar. As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1911.

[222 *United States*, 17.]

Even if the question in litigation is important and should be disposed of without undue delay, a State cannot be expected to move with the celerity of an individual; a motion made in this case by complainant that the court proceed to determine all questions left open by the decision in 220 U. S. 1, denied without prejudice.

The conference suggested by this court, 220 U. S. 36, is one in the cause to settle the decree and not to effect an independent compromise out of court.

THE facts are stated in the opinion

Mr. Samuel W. Williams, Attorney General of the State of Virginia, for the complainant in support of the motion.

Mr. W. G. Conley, Attorney General of the State of West Virginia, for the defendant in response to motion.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a motion on behalf of the Commonwealth of Virginia that the *18 court proceed to determine all questions * left open by the decision of March 6, 1911, 220 U. S. 1. The grounds of the motion are these: On April 20, 1911, the Virginia Debt Commission wrote to the Governor of West Virginia, referring to the suggestion of a conference between the parties in the decision, and requested that he would take steps that would lead to such a conference at an early date. At that time the Governor of West Virginia had called an extra session of the Legislature upon another matter. The constitution forbad the Legislature, when so convened, entering upon any business except that stated in the call, but as there were twenty-six days between the call and the session that followed it, there was time for the Governor to issue a further proclamation on the subject of the debt. The Governor in his message to the Legislature referred to the matter, and put, as questions to be considered, whether the appointment of the Virginia Debt Commission was enough to require West Virginia now "to take the initiative," and whether a Commission should be appointed to meet the Virginia Commission. He also stated that if, without formal action of three-fifths of the body under the Constitution, a majority should express to him the opinion that the Legislature ought to be called into extraordinary session to consider the matter, he should deem it sufficient reason for a call. But it seems that he did not use his power of his own motion or receive such an expression as induced him to use it, and the Legislature does not meet in regular session until January, 1913. The Commonwealth of Virginia concludes from these facts that there is no likelihood of a conference with any satisfactory results.

The Attorney General of West Virginia answered that the members of the Legislature convened in May, 1911, were elected before this cause had been

argued and under conditions that left them uncertain as to the wishes of their constituents; that the Governor was of opinion that he could not constitu-
*19 tionally amend his proclamation so * as to embody consideration of the debt, and that there is no one in West Virginia except the Legislature that has power to deal with the matter. He then suggested a doubt whether the Virginia Debt Commission was empowered to deal with the case in its present phase, in view of the provision in the Resolution creating it that it should not negotiate except upon the basis that Virginia is bound only for the two-thirds of the debt that she had provided for, and concluded that this court ought not to act before the West Virginia Legislature at its next regular session can consider the case in the spirit anticipated by the opinion of the court.

With regard to the doubt implied by the Governor of West Virginia whether it now is incumbent upon that State to take the initiative, and that suggested by its Attorney General whether the Virginia Debt Commission has the necessary power, we are of opinion that neither of them furnishes a just ground for delay. The conference suggested by the court is a conference in the cause. The body that directed the institution of the suit has taken the proper step on behalf of the plaintiff, and it is for the defendant to say whether it will leave the court to enter a decree irrespective of its assent or will try to reach a result that the court will accept. The conference is not for an independent compromise out of court, but an attempt to settle a decree. The provision as to negotiations, in the Virginia Resolution preceding the statute authorizing this suit, refers, we presume, to a settlement out of court and has nothing to do with the conduct of the cause. If the parties in charge of the suit consent, this court is not likely to inquire very curiously into questions of power, if, on its part, it is satisfied that they have consented to a proper decree.

A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business
*20 man; it is enough if * it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace.

Motion overruled without prejudice.[1]

State of Maryland v. State of West Virginia.

Supreme Court of the United States, 1912.

[225 *United States,* 1.]

Report of Commissioners appointed by decree of May 31, 1910, to run, locate and permanently mark with suitable monuments the Deakins line between Maryland and West Virginia from the North Branch of the Potomac River and Pennsylvania, in pursuance of decision, 217 U. S. 1 and 577, confirmed and exceptions thereto overruled.

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[1] For the succeeding phase of this case see *Virginia* v. *West Virginia* (231 U. S. 89), *post,* p. 1692.—Editor.

THE State of West Virginia having moved the court to take up for consideration the exceptions heretofore filed in this cause by the State of Maryland to the report of Commissioners Julius K. Monroe and Samuel S. Gannett, two of the commissioners who were appointed by the decree entered in this cause on the thirty-first day of May, 1910 (see 217 U. S. 1, 577), to run, locate and permanently mark, with suitable monuments, the Deakins or Old State Line, as the boundary line between the States of Maryland and West Virginia,
*2 from low water mark on * the southern bank of the North Branch of the Potomac River to the Pennsylvania line, and to overrule said exceptions and confirm said report, which report is in the words and figures following, to wit:

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We, Julius K. Monroe and Samuel S. Gannett, two of the Commissioners appointed under the decree of the Court rendered May 31, 1910, "to run, locate, and establish and permanently mark with suitable monuments the said Deakins or 'Old State Line' as the boundary line between the States of Maryland and West Virginia from said point (low water mark) on the southern bank of the North Branch of the Potomac River to the said Pennsylvania line, etc.," have the honor to submit the following report, and map entitled, "Map Showing The Boundary Line Between Maryland and West Virginia, from the Potomac River to the Pennsylvania State Line, as surveyed and marked under the decree of the Supreme Court of the United States, rendered May 31, 1910," etc.:

The party was organized and went into camp on July 12, 1910, on Arnold's Ridge, about one mile north of the North Branch of the Potomac River, and immediately began the survey of the line.

Beginning at the Fairfax Stone, a line was first run North 0° 56′ E. along
B
a well marked line to a planted stone marked "1101," at the southwest corner of Military Lot, No. 1101, originally a "bounded maple standing one mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Potowmack River." The intersection of this line with the south bank of the North Branch of the Potomac (at low water mark) was, under the decree of the Court, fixed as the corner of Maryland and West Virginia, and monument No. 1 was therefore erected at this place and became the initial point of the boundary line run in 1910 and 1911.

From the corner of lot 1101 B, where monument No. 2 was erected, the line deflects slightly to the west and follows the old marked line on the
*3 course N. 0° 47′ 53″ E. as * identified by the surveyors in the case in 1897 and shown on the maps filed by the defendants. This line crosses Arnold's Ridge, Laurel Run, Backbone Mountain, Youghiogheny River, and where it intersects the 3rd line of a Maryland tract called "Covent Garden" monument No. 4 was erected and an offset was made to the west. The 3rd line of Covent Garden was followed for a distance of 402.15 feet on the course N. 71° 48′ W. (true) to a planted stone, acknowledged by residents and owners of adjoining property and pointed out by them as being the limit of their respective claims, at this point. Monument No. 5 was built over this stone and the line was run N. 0° 27′ 04″ E. in a manner to follow the property lines, as acknowledged by the citizens of the two states; passing over the center of a planted stone property corner, which marked the beginning of the Maryland tract called Mount Pleasant, surveyed in 1774. Monument No. 6 was built over and around this stone, which was

pointed out by witnesses as marking the place of the original corner, a white oak tree. Continuing on the same course, a large anciently marked white oak tree was reached and identified as the beginning of a Virginia tract of land surveyed for John Pettyjohn in 1781, and also a corner of John T. Goff 1000 acres, survey made in 1782, both of which call for the boundary line. This tree was cut and blocks taken out by your Commissioners which showed surveyors' axe marks in the wood; one 130 years old, one 117 years, and the last 78 years, thus indisputably establishing this course as following the oldest marked line extant. The stump of this tree was removed and monument No. 8 was built in the exact spot occupied by it. Upon trial it was found that from this white oak, northward, the line between property holdings of citizens in the two states, verged to the eastward, and a slight angle was therefore made to the east and the boundary line run N. 0° 42′ 57″ E. to the stump of a bounded sugar tree, the northwest corner of a Maryland tract called Eelshine; this tree, while standing, was identified by the surveyors in this case in 1897, and also by the owners of the tract. The land, since that time has been cleared, and the timber destroyed by fire. The stump of this sugar tree was again pointed out to the Com-
*4 missioners, in 1910, by Peter F. Nine, the * present owner of the tract Eelshine. This stump was removed and monument No. 10 erected exactly where it stood.

From this point the boundary line runs S. 89° 17′ 03″ E. 482.3 feet along the line common to the tract Eelshine and the Virginia Grant to Wm. Ashby for 50 acres, to the southwest corner of the Maryland tract called Buckdale. As the southwest corner of Buckdale and the southeast corner of the Ashby 50 acre tract, which are common, could not be definitely located upon the ground, as all original objects marking them have been destroyed, this point was determined by the intersection of a line produced southward passing through known and accepted points in the "Old Line," namely: "the stake and stone pile," on Lauer Hill, which is the common corner of the Maryland tract called "Maryland," and the Virginia grant to John Hoye for 500 acres, and which was identified and located by the surveyors in this case in 1897, and shown at Red "C-6" upon Map No. 1, filed by defendants, and again identified by your Commissioners in 1910; and a point north of the B. & O. Railroad near Hutton, Maryland, in the property line between lands of the Connell Heirs and George Morris. Monument No. 11 was placed at the intersection of the line above described with the line eastward from Monument No. 10. The course of the boundary from monument No. 11, as above determined, is N. 0° 41′ 02″ E. following closely the lines of the original Virginia grants, and passing through, or very near the several points indicated upon map No. 1 filed in this case by defendant, and testified to as standing in the "Deakins, or Old State Line," to a point on Glover's Hill, 1½ miles north of the Baltimore & Ohio Railroad, where Monument No. 15 was erected. From this point northward it was found that the general course of the property lines verged slightly to the west, and the course of the boundary was here changed to N. 0° 22′ 27″ E to conform thereto, following the well marked divisional lines between the F. & W. Deakins 6000 acre Virginia grant, and the Maryland Military Lots (Nos. 1237 to 1245) and the eastern line of the Hoye and Martin 3600 acre Virginia grant, passing over the summits of Snaggy Mountain and through the

*5 southern end of the Pine Swamp to a point where this * line intersects the southern line of the John Crane 776 acre Virginia grant, a short distance north of the Cranesville and Oakland road, as indicated upon the maps filed by the defendant in this case. This point was determined by reproducing upon the ground the southern line of said 776 acre Crane Survey. Monument No. 19 was erected at this point.

From Monument No. 19 an offset of 971.09 feet was made along the south line of the John Crane 776 acre tract N. 89° 27′ 27″ E. to its intersection with the west boundary of Maryland Military Lot No. 1292, where Monument No. 20 was built. The boundary here turns northward, following the west limit of Military Lots 1292, 1294, 1296, 1298, 1400, & 1402 as laid out by Francis Deakins, on a true course of N. 0° 17′ 00″ E. to the northwest corner of Military Lot 1402. Monument No. 21 was placed at this point and an offset made 53.69 feet S. 89° 43′ 00″ E., along the north side of Lot 1402, (which is also the division line between lands of E. F. Jenkins and M. H. Frankhouser), where Monument No. 22 was erected.

From Monument No. 22 the course of the boundary is N. 0° 24′ 42″ E., passing through, or near the point where a large marked Red Oak formerly stood, testified to in this case by Ethbell Falkenstine, as standing in the Deakins or Old State Line, and shown at the letters "W-K" upon the maps heretofore filed; a planted stone, a short distance north of the Red Oak in the east line of the Henry Banks Survey of 8000 acres, and following a well marked line along with the eastern boundary of the Banks Survey and the western boundary of the Maryland tract called "Canrobert" to a point where it intersects the south line of the 328 acre tract granted by Virginia to Henry Deal, and passing through the same, to a point where the east line of the Banks Survey intersects the south line of a tract of 367 acres granted by Virginia to Henry Deal, where Monument No. 27 was erected.

From Monument No. 27 an offset was made 347.3 feet N. 89° 25′ 12″ E. along the line between the two Henry Deal tracts above mentioned, where Monument No. 28 was placed.

From Monument No. 28 to Monument No. 32 the course of the boundary
*6 is N. 0° 20′ 07″ W. and closely follows * the mutually accepted property lines of citizens of the two States; corners, trees, and fences having been pointed out by various land owners on both sides of the "Old Line." Monument No. 32 replaces a large marked Spanish Oak, which was a common corner of lands owned by John and George W. Vansickle, in West Virginia, and in the west line of land owned by W. M. Fike in Maryland. This tree was cut down and the stump removed by your Commissioners in 1911. From this point northward it was found that the old accepted boundary line veered slightly to the east, and the course of the boundary line was therefore changed to N. 0° 4′ 55″ E. to conform to it.

Monument No. 34 was set at the intersection of this line with the southern boundary line of the State of Pennsylvania.

In addition to the monuments just mentioned as standing at the angular points in the boundary, others were set between, exactly in line (see description of Monuments).

The total number of large monuments erected along the Maryland-West Virginia boundary line is 34, in addition to the one restoring the "Fairfax

Stone." Of small monuments, 26 were erected making a total of 60 permanent marks. The line is also marked at suitable places by 5 copper bolts securely fastened into natural and planted rocks.

A description of instruments and methods used in the survey, the method of constructing the monuments; location, latitude, longitude, approximate elevation, distance, true and magnetic bearings, will be found in the following pages.

Instruments.

The following instruments were used in making the survey: Theodolite, 7½ inch No. 11, United States & Canada Boundary Survey, temporarily loaned during 1910 to this Survey. In 1911, 7½ inch theodolite No. 219 of United States Coast & Geodetic Survey, loaned by the Superintendent of that Bureau in place of No. 11. No. 219 is lighter, works more freely, and is altogether much more satisfactory than No. 11. The circles on both theodolites are graduated to 10′ spaces and read by verniers to 10″. With these instruments the line was ranged out from hilltop to hilltop and flagpoles set at intervals of 1 to 4 miles.

*7 * 2 Gurley transits, circles 5½ inches diameter reading by vernier A to minutes and by vernier B to hundredths of a degree, loaned by Julius K. Monroe. With these transits the line was run from flagpole to flagpole, previously located with the theodolite, in the usual manner with double backsights and foresights. The length of foresight was limited by the length of tape, 500 feet; the length of backsight was limited only by the visibility of the rear tripod. Instead of the ordinary rods for lining in, brass plumb bobs weighing 2 pounds each, supported by tripods 7 feet high, with movable heads were used. As sights were taken on the string supporting the plumb bobs, the line was produced with great accuracy. A brass tack was set in a solid hub at each transit station.

Distances.

Distances were measured to the nearest 1/100 of a foot with a 500 foot standardized steel tape, supported at several points along its length so as to have a uniform slope, approximately parallel to the slope of the ground.

The inclination or slope of the tape was measured by the vertical circle on the transit and the horizontal distance and difference in elevation carefully computed.

Besides the 500 ft. steel tape, which was graduated to single feet, except at each end, where 1 foot was graduated to tenths, a 100 foot steel tape graduated throughout to feet, tenths and hundredths was used for shorter measurements.

Astronomical Observations.

Astronomical observations for azimuth were obtained with the theodolite by observing Polaris near eastern elongation. Ten measurements of the angle between star and mark were made with telescope direct and reversed in 5 positions of the circle. The mark was a bulls-eye lantern placed at one of the transit stations a mile or more distant, northward. Time was obtained from the railroad; a mean time Waltham watch being compared with 75th meridian time as sent by telegraph from the United States Naval Observatory at Wash-

ington each noon, and proper reduction was made for difference in longitude.

*8 Azimuth observations were made at 8 stations along the boundary * line, 36.7 miles in length; usually at or near a point of deflection in the final line.

Geodetic Positions.

At a point near Cranesville, West Virginia, 24 miles north of the Fairfax stone and 12 miles south of the Pennsylvania line, connection was made with Piney Swamp triangulation station located by the United States Geological Survey by a belt of triangulation extending westward from Maryland Heights and Sugarloaf, 2 primary triangulation stations of the Coast and Geodetic Survey. The geodetic position of Piney Swamp station is on United States Standard datum, and is thus free from station error. A portion of the boundary line, 1.9 miles east of this station, measured during the progress of the survey, was used as a base line, and by measuring all the angles in 2 triangles accurate connection was made with this triangulation station. From these data the geodetic positions of all large monuments were computed.

Elevations.

The approximate elevations of all stations were determined by carrying a line of vertical angle measurements along the boundary. The elevation of Fairfax Stone was accepted as 3162 feet above mean sea level, as derived from railroad levels, and checks on the heights as computed from this, were obtained at 5 points from the topographic work of the United States Geological Survey, as follows: Near Gnegy Church; at the crossing of the Northwestern Pike; at Hutton; near Cranesville; and at the intersection of the Maryland-West Virginia line with the Pennsylvania state line. The apparent errors at these check points were distributed at the various stations in proportion to the distance.

MONUMENTS.

List of Monuments from the Fairfax Stone to the Pennsylvania Line, Giving the Size, Method of Construction, and Location,—Together with the Latitude and Longitude of Each of the Principal Monuments.

The PRINCIPAL MONUMENTS are uniform in size and shape, and

*9 consist of a moulded concrete column, * twenty-two inches square at the base, tapering to ten inches square at four feet in height, (top of mould) and finished, in a few instances, with rounded top, but generally flat, pyramidal shape, extending four to five inches above the top of mould, or form, making the entire column four feet four inches in height above base; the corners are beveled one and one half inches in width to prevent defacement.

INSCRIPTIONS: Each Monument, beginning with the initial one at the North Branch of the Potomac River, is numbered consecutively from 1 to 34 Northward to the Pennsylvania State Line; the numbers and the names of the Commissioners being placed upon the south face of the monument, except where set diagonally; the date, 1910, on the North face; the letters MD. on the East, and W. VA. on the West. The letters MD., and W. VA., are 3¼ inches in height and ⅜ inch deep; the numbers 2¾ inches high, and 5/16 inch deep, and the names of Commissioners, one inch in height and of proportional depth.

The inscriptions were moulded in the monuments, when built, (except the monument at Fairfax Stone, and Nos. 1 and 2), by means of reversed bevel faced brass and lead pattern letters, which were attached separately to the inside of the "forms"; subsequently the letters MD., W. VA., the names of Commissioners, and the date, 1910, were soldered on plates of tin reinforced with heavy sheet iron, which were securely fastened to the forms with screws. These plates were depressed slightly below the surface, which, on the finished monuments, formed corresponding elevations.

Material.

Three bags (300 pounds) best Portland cement, and seven bags (700 pounds) washed, white sand, were used in each of the large monuments. The cement and sand were thoroughly mixed before and after adding water. This material was firmly tamped in the "form," the top being finished with an ordinary mason's trowel. No stone was used in the monument.

Base.

The base of each of the principal monuments was made of concrete,
*10 the usual size being 3½ feet square, and 2½ * feet deep, depending upon the character and formation of the ground; in all cases sufficient depth and breadth being obtained to insure stability.

The average amount of material used in each base, was ¾ barrel of best Portland cement, 1200 pounds of sand, and 1500 to 2000 pounds of broken stone. The cement and sand were thoroughly mixed before and after adding water; cement and stone were placed in the excavations in alternate layers and the whole thoroughly tamped and bonded. The base was finished and cross-lines indicating its exact center marked upon it, and when firm enough to sustain the weight of the monument, the "form" was set up and carefully centered by means of the cross-lines, and the monument built before the final "set," thus forming the base and column into one solid mass. In the few instances where the bases were built a day or more before the monument, a large stone was set in the center of the base and allowed to project a foot or more above the surface, and the monument built around it, thus securing a firm bond.

Small Monuments.

Small monuments are also of concrete, uniform in size, 1 foot square and 2 feet high, moulded in a wooden form, without taper, and contain 1 bag (100 pounds) cement, 2 bags (200 pounds) washed, white sand. The top was finished in a similar manner to the large monuments. The letters MD. cut on the east face, W. VA. on the west, and the date, 1910, on the north. The base, 2 feet square and 2 feet deep, also of concrete, and built as in the larger monuments. One bag of cement and four bags of sand, in addition to the broken stone, were used.

The "Fairfax Stone."

The "Fairfax Stone" stands at the head of the North Branch of the Potomac River. It derived its name from Thomas, Lord Fairfax, who became the proprietor of what was known as the "Northern Neck of Virginia." The

original grant was made in 1663, by Charles II of England, and subsequently successively confirmed by James II and George II. The title having rested by
*11 * transfers in Lord Fairfax, on the 7th of September, 1736, Commissioners were appointed, with the approval of George II, to define the boundaries of the grant, which was to be "all the land lying and situate between and within the heads of the Rivers Rappahannock and Potomac, the courses of the said rivers together with the rivers themselves." The survey of the upper part of the Potomac River was made in 1736, and at the head spring as then determined a number of trees were marked by the surveyors. A dispute arose between Lord Fairfax and the representatives of the Colony of Virginia as to the source of the Potomac, and no further work or agreement reached until 1746, when representatives for each side having been named, the survey was resumed and a line was run from the head of the Rappahannock to the head of the Potomac River. The trees and springs located in the former survey of 1736, at the head of the Potomac having been found, the course of the trial line was corrected and the final line run in the reverse direction from the Potomac to the Rappahannock.

Before leaving the head of the Potomac, additional trees were marked and a stone set up, described as follows, in the note book (still in existence) of Thomas Lewis, one of the surveyors: "October 23, 1746, Returned to the spring where we made the following marks: '—' on another Beach WB WR 1746 Y3 —a stone by the corner pine marked $\frac{D}{FX,}$ on a Beach marked AC." This done we bid adieu to the head spring about ½ hour after nine o'clock, our course directing to the head of Rappahannock bearing S. 46° E. 30 poles the top of the mountain in the spring heads on."

When Lieut. N. Michler made his survey of the meridian line north from the Fairfax Stone in 1859, he thus describes the stone in his report. "The initial point of the work,—the Fairfax Stone,—stands on the spot encircled by several small streams flowing from springs about it. It consists of a rough piece of standstone, indifferent and friable, planted to the depth of a few feet in the ground and rising a foot or more above the surface, shapeless in form, it would scarce attract the attention of the passer by. The finding of it was without
*12 difficulty, and its * recognition and identification by the inscription Fx, now almost obliterated by the corroding action of water and air. In order not to disturb this stone the first observatory was built immediately in the rear (South) of it." Here, later, Michler built his monument, which was about 4 feet in height and made of several hewn stones, the upper ones being conical. The original Fairfax Stone was in existence until about the year 1883, when it was destroyed by vandals and subsequently carried away, leaving the Michler monument as the only marker.

The stream surveyed in the year 1736 was what has since been designated the North Branch of the Potomac River. The source, designated as the Fairfax Stone, is upon the divide between the eastern and western water sheds. It is ¼ mile northerly from the summit of the Western Maryland Railroad, which is here the highest point on that line between Cumberland, Maryland, and Elkins, West Virginia.

The stone is easily reached by a trail from Fairfax Station, which is ½ mile to the south east. The large timber all around has been cut by mill men

and fire has destroyed the balance so that the immediate spot is now largely covered by brush and briers. The land near the Fairfax Stone is principally owned by the Davis Coal & Coke Company (in 1910).

On August 12, 1910, during the present work, a new concrete monument was built, replacing both the previous marks. The new monument stands 2 feet North of the center of the base of the Michler Monument, which point was marked by a brass bolt bedded level with surface of the ground. This rock and mark are still left in place but are not visible, and the mark is 1 foot north of the point where the original stone stood. The portion of the Michler Monument above ground was removed.

"Fairfax Stone," Restored 1910.

The base is of concrete 3½ ft. square and 2 ft. deep set flush with surface of ground. On this base the monument was built, utilizing the form which had been designed for, and was afterwards used in the construction of the monuments along the boundary from the Potomac River to the Pennsyl-
*13 vania line. The monument is 22 inches square at * the base and 10 inches square at the top, the latter being built up a few inches and rounded off. The total height being 4 ft. and 4 inches above the base. The monument contains 3½ bags of best Portland Cement and 6½ bags of white sand. It is marked as follows:

On South face Fx On North face 1910.
1746.

The corners are beveled 1½ inches in width.
Latitude 39° 11′ 41.92″ Longitude 79° 29′ 15.50″.

Monument No. 1.

This monument marks the initial point of the present Boundary Survey. It is on the South bank of the North Branch of the Potomac River, 3983 feet N. 0° 56′ E. (true) from the Fairfax Stone. The base is 3½ ft. square and 4 ft. deep and tapers to 2½ ft. square at its top. The monument is placed diagonally on this base and is marked as follows:

On the Northeast side 1910 MD.	On the Southeast side W. Va.
On the Southwest side No. 1 W. Va.	On the Northwest side W. Va.

It can be reached from the Fairfax Station of Western Maryland Railroad by following an old lumber tram road which goes within 100 yards of the river. From the north on Maryland side there is a bridle path leading from the County Road on Arnold's Ridge, to a point almost in sight of this monument, 1½ miles distant.

Latitude 39° 12′ 21.34″ Longitude 79° 29′ 14.67″

Monument No. 2.

Is in place of a maple tree marked "1101" which was the beginning of the Maryland Military Lot 1101. It can be reached from the county road on Arnold's Ridge by the same trail that leads to the river. It is less than ¼ mile from top of the ridge and about 1 mile west of Eli Mosser's house. The boundary line makes a slight angle to west at this point.

Latitude 39° 12′ 33.28″ Longitude 79° 29′ 14.42″

Arnold's Ridge.

*14 A small monument on the highest point of Arnold's * Ridge. It is one mile west of house of Eli Mosser and can be reached by the county road along the ridge.

Monument No. 3.

On summit of Backbone or Great Savage Mountain. The base of monument rests on the solid ledge which forms the crest of the mountain. It is reached with difficulty by an old road crossing the mountain from Eli Mossers to Sommers Mossers upon the west and is more than ¼ mile west of this trail over rough, rocky ground. It can most readily be reached from the west. There is an extended view from this summit as far north as Snaggy Mountain.

Latitude 39° 14′ 12.43″ Longitude 79° 29′ 12.65″

Stahlnaker Ridge.

A small monument about 1 mile west of Sommers Mossers, and ½ mile southwest of county road from Gnegy Church to Breedlove.

Monument No. 4.

Just north of the Youghiogheny River and south of a county road from Gnegy Church to Breedlove. It is in the line of a Maryland land grant called Covent Garden and in property line of Wm. Bittner and Oscar Roth. It is ¾ mile south of Gnegy Church and is easily reached. The monument stands diagonally as the line here changes its course to the westward.

Latitude 39° 15′ 53.73″ Longitude 79° 29′ 10.84″

Monument No. 5.

About 100 yards north of county road from Gnegy Church to Breedlove and in sight of road. It is in a line of the Covent Garden Survey, and is in or near property lines of Wm. Bittner, Chas. Winters, Oscar Roth and J. Stahlnaker. The monument was built over and around a rough stone marking property corners and stands diagonally as the course of the boundary line here turns northward.

Latitude 39° 15′ 54.97″ Longitude 79° 29′ 15.69″

*15 **Monument No. 6.*

On the south side of the county road from Oakland to Horse Shoe Run, 100 yards southwest of the cross roads at Gnegy Church. On or near the property line of Daniel Gnegy and Elijah Bechtel. The monument was built over and around a stone property corner which marked the beginning of the Maryland land grant called "Mount Pleasant" surveyed in 1774. The original beginning called for was a white oak tree, now gone. The stone was pointed out as said beginning by Daniel Gnegy.

Latitude 39° 16′ 31.10″ Longitude 79° 29′ 15.32″

Hamstead Hill.

A small monument on the Obed Hamstead Hill, 2/3 of a mile east of the southwest prong of the Youghiogheny River and ¾ mile north of Gnegy

Church. The monument is 45 feet north of an east-west wire fence and 5 feet west of a north-south line fence.

Monument No. 7.

Situated 15 feet south of center of county road from Cash Valley to the Horseshoe Run road and 1½ miles east of Eglon, West Virginia. The land on the east of monument is owned by George H. Gauer and that on the west by William Weimer.

Latitude 39° 17′ 46.83″ Longitude 79° 29′ 14.56″

Monument No. 8.

About 1½ miles northeast of Eglon, West Virginia, and 150 yards east of house of Silas Fike. This monument marks the spot where stood a large white oak tree called for in the Virginia Patent to John Pettyjohn, surveyed May 30, 1781, for 400 acres. The call being at "a white oak in the Maryland line and running—and finally to pointers in the Maryland line and with said line N. 226 poles to the beginning." This tree was blocked during the survey of 1910 and the oldest mark counted 130 years growth, the second 117 years, and the third 78 years. The block was saved. The tree was cut down and stump blown up with dynamite and replaced by the monument which now
16* marks property holdings of Silas Fike, Amelius * Fike, and Seymour Hamstead. There is an angle to the east in the boundary line at this point.

Latitude 39° 17′ 52.63″ Longitude 79° 29′ 14.50″

Silas Fike's Ridge.

A copper bolt set in a rock flush with the ground on summit of a flat timbered ridge ¼ mile north of house of Silas Fike, who lives 1½ miles northeast of Eglon, West Virginia.

Dawson's Hill.

A small monument on wooded hill of Lloyd Dawson, about ¾ mile south of the Northwestern Pike. It is 26 feet west of north-south fence and 195 feet north of an east-west fence.

Monument No. 9.

Situated 8 miles southwest of Oakland, Maryland, in the angle formed by the Northwestern Turnpike and the county road from Eglon, West Virginia, to Oakland. The monument is 100 yards east of the Youghiogheny River and is on a slight ridge between above described roads and can be seen from them.

Latitude 39° 19′ 07.64″ Longitude 79° 29′ 13.29″

Offut's Hill.

A small monument on summit of wooded hill belonging to D. E. Offutt, ¼ mile north of the Northwestern Turnpike and 10 feet east of a north-south fence.

Stahl's Hill.

A small monument on summit of Stahl's Hill, 20 feet west of an old split rail fence running north and south and is on land owned by Peter F. Nine.

Monument No. 10.

In an open field about 300 yards south of a county road running east and west across the Youghiogheny River. The monument stands in place of a sugar tree which formerly stood here and marked a corner of the Maryland
*17 * grant called "Eelshine." The place was pointed out by Peter F. Nine, who owns the property east of it. John Bittner owns the land to the west and his house is 100 yards west of the monument. The boundary line turns to the east and the monument stands diagonally.

Latitude 39° 20′ 39.47″ Longitude 79° 29′ 11.82″

Monument No. 11.

Situated 482 feet east from Monument No. 10, as there is here an offset in the line. It is the line of Eelshine and Ashby 50 acre survey, and stands diagonally as boundary line here turns to north.

Latitude 39° 20′ 39.41″ Longitude 79° 29′ 05.68″

Monument No. 12.

Is upon the south side of the county road from Brookside, West Virginia, to Oakland, Maryland. It is about 100 feet north of the Youghiogheny River on land of Dorsey Ashby and about 100 yards southwest of his house.

Latitude 39° 21′ 04.15″ Longitude 79° 29′ 05.30″

Ashby's Hill.

A small monument on summit of a flat ridge owned by Dorsey Ashby, ¼ mile northwest of road from Brookside to Oakland, and ¼ mile northwest of Mr. Ashby's house.

Lauer Hill (South Brow).

A copper bolt set in a rock 6 by 6 by 20 inches set flush with surface of ground, on south brow of Lauer Hill ¾ mile south of house of Charles Fulks. It can be reached from the north by road and trail through the woods.

Monument No. 13.

On the summit of Lauer Hill about 6 miles southwest of Oakland, Maryland. The monument can be reached by a trail running south from a road to a coal mine near Chas. Fulk's house, which is on the north side of Lauer Hill about ½ mile from summit. The land is covered with timber and is owned by Daniel E. Offutt.

Latitude 39° 22′ 02.42″ Longitude 79° 29′ 04.40″

*18 **Miller.*

A small monument on summit of flat ridge 1/3 mile north of Laurel Run, on land owned by J. S. Miller. It can be reached by road from Crellin, Maryland, which is 1½ miles to the east.

Poling.

A small monument on a timbered ridge 1½ miles northwest of Crellin, Maryland, and on land owned by Zach Poling. It is 120 feet south of a 2nd class road crossing the ridge.

White.

A small monument ¾ mile south of Hutton, Maryland, on northwest side of a 2nd class road and is on land owned by Charles White.

Monument No. 14.

Is about 200 yards west of Hutton, Maryland, Station, B. & O. R. R., and close to south limit of right of way of main line of that railroad. It is north of wagon road from Hutton, Maryland, to Corinth, W. Va., is conspicuously placed, and can be seen from trains as they pass. It is near lands of John A. Connell, Chas. White, and Grant Felton.

Latitude 39° 25′ 08.88″ Longitude 79° 29′ 01.54″

Morris-Connell.

A small monument on summit of flat ridge cleared on west and timbered on east. It is ½ mile north of Hutton, Maryland, and is on land owned by George Morris on the west and J. A. Connell on the east.

Monument No. 15.

About 1½ miles north of Hutton, Maryland, or Corinth, West Virginia, and can be reached by road from Corinth. The monument is on cleared land owned by Dennis Glover. There is a slight deflection of the boundary line to the westward at this point.

Latitude 39° 26′ 07.60″ Longitude 79° 29′ 00.63″

*19 **Severe.*

A small monument on north side of county road 2 miles north of Corinth, West Virginia. On land owned by John M. Browning.

Browning.

A small monument on summit of a flat wooded ridge owned by John M. Browning, 2½ miles north of Corinth, West Virginia.

Camp Rocks.

A copper bolt set in a hole drilled in top of and near the northeast corner of a rocky bluff on south slope of Snaggy Mountain. 700 feet south of old Burchinal road. Stones are piled around and over the bolt. From this point, Glover's Hill, Backbone Mountain, and other distant points southward can be seen.

Burchinal.

1st. A small monument on top of a large flat rock 20 feet south of old Burchinal road which crosses Snaggy Mountain near this place.

2nd. A copper bolt set in solid rock 350 feet north of the small monument described above.

3rd. A copper bolt set in solid rock 1,400 feet north of small monument described above.

Monument No. 16.

On one of the main summits of Snaggy Mountain about 1,281 feet east of the "Fairfax Meridian," and 75 yards from a rough road to fields on top of mountain. It can be reached from the Burchinal Road, which comes out at White Oak Spring on the road to Terra Alta.

Latitude 39° 29′ 07.98″ Longitude 79° 28′ 59.11″

Monument No. 17.

Is on the very high north summit or brow of Snaggy Mountain and is one of the highest points along the boundary line, being about 3070 feet above mean sea level. It can be reached either from a trail which crosses through
*20 * the gap between Monuments 16 and 17, or from the Cranesville-Oakland road above Brownings Lake, or by climbing the steep side of the mountain just south of Pine Swamp.

Latitude 39° 29′ 50.50″ Longitude 79° 28′ 58.75″

Teets.

A small monument on north side of county road which crosses Pine Swamp about 3 miles south of Cranesville, West Virginia. The monument is about 1,000 feet south of house of Eugene Teets.

Monument No. 18.

On the north side of the county road from Cranesville, West Virginia, to Oakland, Maryland, and is about 3 miles south of Cranesville, 100 yards east of house of Eugene Teets, and west of Muddy Creek, and on the edge of Pine Swamp, which has here been drained.

Latitude 39° 31′ 38.50″ Longitude 79° 28′ 57.84″

Monument No. 19.

Is about 2½ miles southeast of Cranesville, West Virginia, and is on the western edge of the Pine Swamp about 100 yards from solid ground. The foundation of the monument rests on hard sand 4 feet below the surface. The timber and brush near the monument are mostly dead or burnt. The land is owned by Hiram Ringer. The monument is set diagonally as the line turns abruptly east.

Latitude 39° 31′ 53.96″ Longitude 79° 28′ 57.71″

Monument No. 20.

Near the middle of Pine Swamp about 3 miles southeast of Cranesville, West Virginia, ⅓ mile west of house of John H. Sommers and 50 feet west of Muddy Creek. The base of the monument is 4 feet square and 6 feet deep, resting on a sticky clay. The surface of the swamp near this monument is very soft and all material had to be drawn by men on a sled for a distance of 200 yards. The land is owned by Hiram Ringer, and the adjoining land to the east by John H. Sommers. The Monument is set diagonally.

Latitude 39° 31′ 54.05″ Longitude 79° 28′ 45.32′[″]

*21 **Monument No. 21.*

One mile east of Cranesville, West Virginia, in a small ravine, and is on property line between M. H. Frankhouser and E. F. Jenkins at the Northwest corner of Maryland Military Lot 1402, at the end of 2nd line. It is 200 yards northwest of M. H. Frankhouser's house, 50 yards west of county road and on northeast side of Pine Swamp. The Monument stands diagonally as the line turns to the east.

Latitude 39° 33′ 08.69″ Longitude 79° 28′ 44.85″

Monument No. 22.

Is 53.69 feet eastward from Monument No. 21 in the same ravine, and about 100 feet west of the county road. It stands in the 2nd line of lot 1402 and is also on the property line between Frankhouser & Jenkins. The Monument stands diagonally as the boundary line turns northward again.

Latitude 39° 33′ 08.68″ Longitude 79° 28′ 44.16″

Monument No. 23.

Is about 1 mile east of Cranesville, West Virginia, 80 feet north of county road from that place to Sang Run, Maryland. It is on a bank above a large spring and is on cleared land owned by J. G. Elsey, and is 50 yards north of house of E. F. Jenkins.

Latitude 39° 33′ 22.93″ Longitude 79° 28′ 44.03″

Elsey's Hill.

A small monument on summit of flat cultivated ridge, 1 mile east of Cranesville, on land owned by J. G. Elsey, and ¼ mile north of house of E. F. Jenkins.

Latitude 39° 33′ 34.93″ Longtitude 79° 28′ 43.92″

Strawser Road.

A small monument on north side of road from Cranesville, West Virginia, to Sang Run, Maryland, about 1½ miles northeast of Cranesville and on land owned by Samuel A. Strawser.

*22 * *Fike's Mountain (South Brow).*

A small monument on South Brow of Fike's Mountain, 2 miles northeast of Cranesville. It can be reached by a rough road through the woods.

Monument No. 24.

On summit of Fike's Mountain 2¼ miles northeast of Cranesville, West Virginia. It can be reached by a rough trail through the woods from a wagon road which crosses the mountain ½ mile west of Monument. The summit of the mountain is comparatively flat and no distant large monuments can be seen. The small monument on the south brow is visible as well as small monument on north brow.

Latitude 39° 34′ 49.21″ Longitude 79° 28′ 43.23″

Fike's Mountain (North Brow).

A small monument on the north brow of Fike's Mountain, 1041.56 feet northward from Monument No. 24. It is 2½ miles northeast of Cranesville *nad* [and] ½ mile northeast of county road, which crosses Fike's Mountain ¾ mile west of this point.

Monument No. 25.

On a timbered flat ridge north of White Rock Run near southeast corner of John A. Reckard's land and ½ mile south of his house. It is in the woods 100 yards from private road from the Cranesville road to Reckard's house.

Latitude 39° 36′ 06.30″ Longitude 79° 28′ 42.51″

Reckard Road.

A small monument 30 feet south of a second class road through the woods near house of John A. Reckard about 6 miles west of Friendsville, Maryland.

Herbert Friend's Ridge.

A small monument on summit of flat ridge partly covered with timber and brush, owned by Herbert Friend, and is ½ mile southeast of his house. It is 6 miles southwest of Friendsville.

*23 **Monument No. 26.*

On north side of county road from Keeler Glade to Friendsville and is 5 miles southwest of latter place. It is on land of Sherman Friend, about 100 yards northeast of his house.

Latitude 39° 37′ 47.35″ Longitude 79° 28′ 41.57″

Sherman Friend's Hill.

A small monument on summit of a flat cleared hill, owned by Sherman Friend, who lives 300 yards to southwest. It is 5 miles southwest of Friendsville, Maryland.

Melville Friend's Hill.

A small monument on summit of flat cleared hill owned by Melville G. Friend, who lives 5½ miles west of Friendsville, Maryland, and 300 yards west of monument. A road crosses the hill 200 yards west of monument, and another is at foot of hill 300 yards to north of it.

Monument No. 27.

On north side of county road near Mrs. Marshall Friend's house, about 5 miles west of Friendsville, Maryland. It is on south edge of a cleared field bordering the county road and is on south property line of Mrs. Marshall Friend. It is in the Henry Deal surveys. The monument stands diagonally as boundary line has offset to east.

Latitude 39° 38′ 32.37″. Longitude 79° 28′ 41.16″.

Monument No. 28.

This monument is 347.3 feet eastward from Monument No. 27, and the same description applies to it. It also stands diagonally as boundary line here turns northward.

Latitude 39° 38′ 32.40″. Longitude 79° 28′ 36.72″.

Monument No. 29.

Is north of a wagon road through land of Jere Teets, and is about ½ mile southeast of his house, and 5 miles west of Friendsville, Maryland.

Latitude 39° 38′ 58.92″. Longitude 79° 28′ 36.92″.

*24 **Jere Teets' Ridge.*

A small monument on a flat cultivated ridge sloping to the east, owned by Jere Teets, and is 150 yards east of his house, which is 5 miles west of Friendsville, Maryland. It is a few feet north of an east-west private road.

L. Dedrick's Ridge.

A small monument on a flat, cleared ridge, owned by L. Dedrick. It can be reached from county road on the west by leaving that road near Chestnut Avenue Church and going eastward past house of Joshua Fike.

Monument No. 30.

On summit of Evans Hill, 1 mile west of Fearer Post-office, Maryland, and 150 yards south of the county road from Fearer to Chestnut Avenue Church. The monument is on cultivated land owned by Hosea Thomas, who lives 200 yards to the west.

Latitude 39° 40′ 15.92″. Longitude 79° 28′ 37.50″.

Monument No. 31.

On north side of county road from Friendsville, Md., to Hazelton, West Va., and is 1 mile west of Fearer, Md. It is 100 yards west of house of A. J. Thomas and on line dividing his property from that of Hosea Thomas.

Latitude 39° 40′ 26.10″. Longitude 79° 28′ 37.58″.

Monument No. 32.

Is ½ mile southeast of house of Geo. W. Vansickle, and is nearly the same distance southwest of W. M. Fike's house, and about 5 miles west of Selbys-

port, Maryland. The monument stands in place of a large Spanish Oak tree, which was removed during the survey in 1911. This tree was corner of property of John Van Vansickle, George W. Vansickle, on the west, and in a line of W. Marshall Fike on the east. The land is cleared and the boundary line makes a slight deflection angle to the east. The monument is marked "Span Oak" in addition to other inscriptions.

Latitude 39° 41′ 14.28″. Longitude 79° 28′ 37.94″.

*25 **F. T. Fike's Ridge.*

A small monument in a field owned by F. T. Fike 200 yards east of a road leading from George Vansickle's place to Selbysport, Maryland.

Monument No. 33.

On north side of county road leading towards Selbysport, Maryland, and is about 5 miles west of that place. It is on line between cleared land owned by James McDermott and Isaiah Umble.

Latitude 39° 42′ 06.58″. Longitude 79° 28′ 37.84″.

Thomas' Ridge.

A small monument on cleared flat ridge owned by M. M. Thomas on the west and by Joseph Thomas on the east. It is 300 yards northwest of house of Joseph Thomas and ½ mile south of Pennsylvania State Line.

Monument No. 34.

At the intersection of the Md.-W. Va. boundary line from the south with the Pennsylvania state line. It is 2 miles southwest of Markleysburg, Pennsylvania, ¼ mile east of point where the pike to that place crosses the Penna. line, and ¼ mile northeast of house of M. M. Thomas. It is 1051 feet westward from the Mason & Dixon mound in which a stone monument marked, "55.2 M 1885," was set by survey made in 1885 by the states of Pennsylvania and West Virginia.

Monument 34 is 40 feet south of oil pipe line, which runs through Pennsylvania near its southern boundary, and is ¼ mile west of a metal gate house of this pipe line. It is in the straight line between Monuments of 1885 numbered 55.2 M and 54.2 M; the latter being 4276 feet to the westward and in center of a Mason & Dixon mound. The land south of Monument No. 34 is owned by M. M. Thomas. The monument sets square and is marked the same as others, excepting that on the north face are the letters PA above the date 1910.

Latitude 39° 43′ 15.88″. Longitude 79° 28′ 37.72″.

*26

* Table No. 1.

Horizontal Distances from Monument No. 1,—Distances Between Monuments,—True Bearings,—Magnetic Bearings and Approximate Elevations Above Mean Sea Level.

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monuments.	True bearings.	Magnetic bearings October 1, 1910.	Approximate elevation above mean sea level.
	(*Feet.*)	(*Feet.*)	° ′ ″	° ′	
Fairfax	3989.13				3162 ft
		3989.13	S. 0 56 00 W.		
1	0000.00				2721 "
		1208.55	N. 0 56 00 E.		
2	1208.55			.....	2894 "
		767.94	N. 0 47 53 E.	N. 4 40 E.	
Arnolds Ridge	1976.49		"	"	3103 "
		9265.63			
3	11242.12		"	"	3343 "
		6664.26	"	"	
Stahlnaker Ridge	17906.38		"	"	2778 "
		3587.76			
4	21494.14				2480 "
		402.15	N. 71 48 00 W.		
5	21896.29			.....	2536 "
		3655.65	N. 0 27 04 E.	N. 4 19 E.	
6	25551.94				2523 "
		4052.94	"	"	
Hamsteads Hill	29604.88				2575 "
		3610.43	"	"	
7	33215.31				2512 "
		587.40	"	"	
8	33802.71				2535 "
		1371.44	N. 0 42 57 E.	N. 4 48 E.	
Silas Fike Bolt in rock	35174.15				2568 "
		2650.09	"	"	
Dawson's Hill	37824.24				2548 "
		3568.81	"	"	
9	41393.05				2441 "
		1391.72	"	"	
Offuts Hill	42784.77				2558 ft
		5280.81	N. 0 42 57 E.	N. 4 38 E.	
Stahl's Hill	48065.58				2707 "
		2621.23	"	"	
10	50686.81				2464 "
		482.30	S. 89 17 03 E.	.....	
*27 * 11	51169.11				2444 "
		2503.67	N. 0 41 02 E.	N. 4 42 E.	
12	53672.78				2420 "
		1188.10	"	"	
Ashby's Hill	54860.88				2617 "
		3321.20	"	"	
Lauer Hill Bolt in rock	58182.08				2807 "
		1386.99	N. 0 41 02 E.	N. 4 42 E.	
13	59569.07				2857 "
		7505.82	"		
Miller	67074.89				2619 "
		3042.91	"	"	
Polling	70117.80				2634 "
		5274.19	"	"	
White	75391.99				2433 "
		3047.23	"	"	
14	78439.22				2470 "
		2405.81	"	"	

TABLE No. 1—*Continued.*

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monuments.	True bearings.	Magnetic bearings October 1, 1910.	Approximate elevation above mean sea level.
Morris–Connell	80845.03				2548 "
		3536.24	"		
15	84381.27				2587 "
		4873.83	N. 0 22 27 E.	N. 4 34 E.	
Severe	89255.10				2530 "
		1713.46	"	"	
Browning	90968.56				2622 "
		7280.65	"	"	
Burchinal road	98249.21				2799 "
		4386.10	"	"	
16	102635.31				3020 "
		4302.13	"	"	
17	106937.44				3072 "
		9976.18	"	"	
Teet's Road	116913.62				2572 "
		953.38	"	"	
18	117867.00				2572 "
		1563.97	"	"	
19	119430.97				2572 "
		971.09	N. 89 27 27 E.	.....	
20	120402.06				2572 "
		7553.36	N. 0 17 00 E.	N. 4 29 E.	
*28 * 21	127955.42				2575 "
		53.69	S. 89 43 00 E.	.....	
22	128009.11				2575 "
		1441.82	N. 0 24 42 E.	N. 4 48 E.	
23	129450.93				2630 "
		1213.70	"	"	
Elsey's Hill	130664.63				2788 "
		2696.96	"	"	
Strawser Road	133361.59				2494 "
		3868.96	"	"	
Fike's Hill—South brow	137230.55				2862 "
		951.02	N. 0 24 42 E.	N. 4 48 E.	
24	138181.57				2867 "
		1041.56	"	"	
Fike's Hill—North brow	139223.13				2843 "
		6760.07	"	"	
25	145983.20				2582 "
		4621.04	"	"	
Near Reckart road	150604.24				2344 "
		2534.50	N. 0 24 42 E.	N. 4 48 E.	
H. Friend	153138.74				2379 "
		3070.16	"	"	
26	156208.90				2260 "
		568.91	"	"	
Friends Hill	156777.81				2331 "
		2995.97	"	"	
M. O. Friend	159773.78				2299 "
		991.13	"	"	
27	160764.91				2229 "
		347.31	N. 89 25 12 E.	.....	
28	161112.22				2221 "
		2682.81	N. 0 20 07 W.	N. 4 10 E.	
29	163795.03				2193 "
		1493.04	"	"	
Jer. Teets	165288.07				2282 "
		2411.66	"	"	

TABLE No. 1—*Continued.*

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monuments.	True bearings.	Magnetic bearings October 1, 1910.	Approximate elevation above mean sea level.
L. Dedrick	167699.73				2331 "
		3887.49	"	"	
*29 * 30	171587.22				2399 "
		1031.22	"	"	
31	172618.44				2344 "
		4874.95	"	"	
32	177493.39				2337 "
		3070.97	N. 0 04 55 E.	N. 4 38 E.	
F. T. Fike	180564.36				2337 "
		2221.59	"	"	
33	182785.95				2289 "
		4549.13	"	"	
Thomas	187335.08				2301 "
		2463.89	"	"	
34	189798.97				2321 "

TABLE No. 2.

Magnetic Bearings Between Monuments on the Maryland-West Virginia Boundary Line from the Potomac River to the Pennsylvania line, for October, 1910.

NOTE: The original observations were reduced at the office of the Coast and Geodetic Survey, Washington, D. C., by courtesy of the Superintendent of that Bureau.

Monuments Nos.	True bearing.	Magnetic bearing.	Magnetic declination.	Number of observations.
2–4	N. 0° 47′ 53″ E.	N. 4° 40′ E.	3° 52′ W.	20
5–7	N. 0° 27′ 04″ E.	N. 4° 19′ E.	3° 52′ W.	7
8–10	N. 0° 42′ 57″ E.	N. 4° 38′ E.	3° 55′ W.	8
11–15	N. 0° 41′ 02″ E.	N. 4° 42′ E.	4° 01′ W.	6
15–18	N. 0° 22′ 27″ E.	N. 4° 34′ E.	4° 12′ W.	13
20–21	N. 0° 17′ 00″ E.	N. 4° 29′ E.	4° 12′ W.	2
23–27	N. 0° 24′ 42″ E.	N. 4° 48′ E.	4° 23′ W.	5
28–32	N. 0° 20′ 07″ W.	N. 4° 10′ E.	4° 30′ W.	5
32–34	N. 0° 04′ 55″ E.	N. 4° 38′ E.	4° 33′ W.	3

If values for shorter intervals are desired, it will probably be best to
*30 obtain them by interpolating the declination. * The value for the line between Nos. 20 and 21 is probably less reliable than the others, as it depends upon only two results which differ by 10′.

We return herewith a financial statement showing in detail the money actually expended by the Commissioners for surveying and marking the boundary line under the decree in this case, including the per diem compensation of all the Commissioners. We also return herewith the several exceptions made and filed before the Commissioners by Mr. W. McCulloh Brown, one of the Commissioners, during the progress of the work, together with such explana-

tions, observations and notes as we have thought proper to make concerning said exceptions for the information of the court.

We also return herewith a number of photographs taken upon the ground illustrating the monuments erected by us to mark the line as run by us, showing the character of the work, method of construction and location of such monuments.

Respectfully submitted,
JULIUS K. MONROE,
SAMUEL S. GANNETT,
Commissioners.

And this cause coming on this day to be heard upon said motion and upon the said report of Julius K. Monroe and Samuel S. Gannett, and upon the separate report of W. McCulloh Brown, one of the said Commissioners, including his protest and exceptions in respect to said report of Commissioners Monroe and Gannett, and also upon the supplemental report filed by said Commissioners Monroe and Gannett; and the court being now fully advised in the premises:

Mr. Isaac Lobe Straus and *Mr. Edgar Allen Poe* for complainant.

Mr. Wm. G. Conley and *Mr. G. E. Price* for defendant.

*31 It is thereupon adjudged, ordered and decreed that the * said exceptions filed on behalf of the State of Maryland, as aforesaid, to said report of Commissioners Julius K. Monroe and Samuel S. Gannett, be, and they are, hereby overruled, and that said report be, and the same is, hereby in all respects confirmed.

It is further adjudged, ordered and decreed that the line as delineated and set forth in said report of Commissioners Monroe and Gannett, and upon the map accompanying the same and referred to therein, which line has been marked with permanent monuments, as stated in said report, be, and the same is hereby, established, declared and decreed to be the true boundary line between the said States of Maryland and West Virginia, and said map is hereby directed to be filed as part of this decree.

And it appearing that the total expenses and compensation of said Commissioners and the expenditures attending upon the discharge of their duties amount to the sum of $17,154.60, it is further adjudged, ordered and decreed that the same be, and they are, hereby approved and allowed as part of the costs of this suit, to be borne equally between the parties to this cause. And it appearing from said report that the State of Maryland has already paid $5,038.40 of said amount, and that the State of West Virginia has already paid $12,116.11 of said amount, it is ordered that said amounts be credited to said States respectively in the settlement of the costs of this suit between them in accordance with the provisions of this decree and the former decrees entered herein.

It is further adjudged, ordered and decreed that the clerk of this court do transmit to the chief magistrates of the States of Maryland and West Virginia copies of this decree, duly authenticated under the seal of this court, omitting from said copy, however, the map filed with the report of said Commissioners Monroe and Gannett above mentioned.

May 27, 1912.

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1913.

[231 *United States,* 89.]

In a controversy between States, this court will not refuse a request made in good faith by one of the parties for reasonable time to effect a settlement, but will comply therewith as near as it can consistently with justice.

On complainant's motion to proceed to final hearing and respondent's request for reasonable time to proceed with negotiations for amicable adjustment the case is assigned for next April.

THE facts are stated in the opinion.

Mr. Samuel W. Williams, Mr. William A. Anderson, Mr. John B. Moon and *Mr. Randolph Harrison* for the State of Virginia.

Mr. Holmes Conrad and *Mr. Sanford Robinson* for the bond-holding creditors.

Mr. A. A. Lilly, Attorney General of the State of West Virginia, *Mr. V. B. Archer, Mr. Charles E. Hogg* and *Mr. John H. Holt* for the State of West Virginia.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In March, 1911 (*Virginia* v. *West Virginia,* 220 U. S. 1), our decision was given "with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed." In view, however, of the
*90 * nature of the controversy, of the consideration due the respective States and the hope that by agreement between them further judicial action might be unnecessary, we postponed proceeding to a final decree and left open the question of what, if any, interest was due and the rate thereof, as well as the right to suggest any mere clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled. In October, 1911, we overruled without prejudice a motion made by Virginia to proceed at once to a final determination of the cause on the ground that there was no reasonable hope of an amicable adjustment. *Virginia* v. *West Virginia,* 222 U. S. 17.

The motion on behalf of the State of Virginia now before us is virtually a reiteration of the former motion to proceed and is based upon the ground that certain negotiations which have taken place between the Virginia Debt Commission representing Virginia, and a Commission representing West Virginia, appointed in virtue of a joint resolution of the legislature of that State, adopted in 1913, make it indubitably certain that no hope of an adjustment exists. But without reviewing the course of the negotiations relied upon, we think it suffices to say that in resisting the motion the Attorney General of West Virginia on behalf of that State insists that the view taken by Virginia of the negotiations

is a misapprehension of the purposes of West Virginia, as that State since the appointment of the Commission on its behalf has been relying upon that Commission "to consummate such an adjustment and settlement of said controversy as to commend the result of its negotiations to the favorable consideration of the Governor and the legislative branch of its government, and thus terminate said controversy to the satisfaction of her people and the Commonwealth of Virginia, and upon the principles of honor and justice to both States, and in fairness
*91 to the holders of the debt * for whose benefit this controversy is still pending." The Attorney General further stating that in order to accomplish the results just mentioned, a sub-committee of the Commission of West Virginia has been and is engaged in investigating the whole subject with the purpose of preparing a proposition to be submitted to the Virginia Debt Commission, to finally settle the whole matter and that a period of six months' time is necessary to enable the Committee to complete its labors.

Having regard to these representations, we think we ought not to grant the motion to proceed at once to consider and determine the cause, but should, as near as we can do so consistently with justice, comply with the request made for further time to enable the Commissioners of West Virginia to complete the work which we are assured they are now engaged in performing for the purpose of effecting a settlement of the controversy. As, however, the granting of a six months' delay would necessitate carrying the case possibly over to the next term and therefore be in all probability an extension of time of more than a year, we shall reduce somewhat the time asked and direct that the case be assigned for final hearing on the 13th day of April next at the head of the call for that day.

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1914.

[234 *United States,* 117.]

The ordinary rules of legal procedure applicable to cases between individuals cannot be always applied to controversies between States involving grave questions of law determinable by this court under the exceptional grant of jurisdiction conferred by the Constitution.

*118 * In this case the defendant State is permitted to file a supplemental answer, the averments in which are to be considered as traversed by the complainant State, and the subject-matter of the supplemental answer is referred to the Master before whom previous hearings were had with directions to report at the commencement of the next term of this court.

THE facts, which involve the procedure and practice in an original case between two States of the Union and the rules to be applied in regard to the filing of a supplemental answer, are stated in the opinion.

Mr. William A. Anderson and *Mr. Randolph Harrison,* with whom *Mr. John B. Moon, Mr. John G. Pollard,* Attorney General of the State of Virginia,

and *Mr. Samuel W. Williams,* former Attorney General, were on the brief, for complainant.

Mr. A. A. Lilly, Attorney General of the State of West Virginia, and *Mr. John H. Holt,* with whom *Mr. V. B. Archer* and *Mr. Charles E. Hogg* were on the brief, for defendant.

Mr. Sanford Robinson, with whom *Mr. Holmes Conrad* was on the brief, for the bondholding creditors.

Mr. Chief Justice White delivered the opinion of the court.

This case, which was begun in 1906, was elaborately argued in 1907 on a demurrer, which was overruled. 206 U. S. 290. It was again argued in 1908 on a motion to appoint a Master. 209 U. S. 514. Before that officer there was an extended hearing and a full report of all the matters involved was filed in March, 1910. It was then argued on a motion to take further testimony, and was
*119 ultimately heard in an argument which extended many * days, every party in interest being represented, in the month of January, 1911.

Notwithstanding these facts when in March, 1911, the court came to decide the controversy, although it fully reviewed and passed upon the fundamental issues, as its obvious duty required it to do, and fixed the principal sum due by the State of West Virginia to the State of Virginia, in view of the consideration due to the parties as States and that the cause was, as then said, "no ordinary commercial suit, but, . . . a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies," the controversy was not completely and irrevocably disposed of but was left open for a time not specified to the end that any clerical errors that might have crept into the calculations of the sums due could be corrected and to give the States time to consider the subject of liability for interest in the light of what had been decided and to agree as to the rate and period of the interest to be paid on the principal sum which was determined. 220 U. S. 1, 36.

On the convening of the court in the following October, 1911, a motion was made on behalf of the State of Virginia to proceed at once to a final decree. Listening to the suggestion of the State of West Virginia to the effect that it desired further time to consider the subject, and in view of the public considerations which had prevailed when the decree was entered, the motion of Virginia was overruled. 222 U. S. 17.

Yet, further, when in November, 1913, another motion on the part of Virginia was made to set the case down to be finally disposed of at once upon the statement that no agreement between the parties was possible, again giving heed to the request of West Virginia through its constituted officers for a postponement for a stated time and to the statement that they were engaged in an honest en-
*120 deavor * to deal with the controversy and if possible to come to an agreement as to the subjects left open, the motion of Virginia was again refused, 231 U. S. 89, and as it was possible to give to the State of West Virginia all the time which that State in resisting the motion asked and yet secure against the possibility of the hearing being carried over to another term, the case was assigned

for hearing on the thirteenth of April of this year. When that day was reached, the State of West Virginia, in accord with a motion filed some days before, prayed leave to be permitted to file a supplemental answer asserting the existence of credits, which if properly considered would materially reduce the sum fixed as due to the State of Virginia, the said answer in addition asserting various grounds why interest should not be allowed in favor of Virginia and against West Virginia on the sum due. Resisting this request the State of Virginia insists that the items embraced in the supplemental answer asked to be filed had in effect already entered into the considerations by which the principal sum due was fixed, and that if not, the case should not be postponed for the purpose of permitting the rights urged in the answer to be availed of because every item concerning such alleged rights was proved in the case before the Master, was mentioned in his report and was known or could have been known by the use of ordinary diligence by those representing West Virginia. And it is this controversy we now come to dispose of.

Without intimating any opinion whatever as to whether the items with which the proposed supplemental answer deals entered into the processes of calculation or reasoning by which the sum due was previously fixed, and moreover, without intimating any opinion as to how far the items embraced in the answer could serve as credits upon the sum previously found due and therefore to that extent
*121 reduce the amount, we think it is obvious that most of the * items embraced in the answer were contained in the Master's report, and in any event all were available then for every defense now based upon them if their consideration had been pressed in the aspect and with the assertions of right now made.

The question then is, Under these conditions ought the permission to file the supplemental answer be granted? We think it must be conceded that in a case between ordinary litigants the application of the ordinary rules of legal procedure would render it impossible under the circumstances which we have stated to grant the request. We are of opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States involving grave questions of public law determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving State, also in our opinion operates no injustice to the opposing State, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

*122 * Because of these convictions, we therefore make the following order:

That the motion on the part of the State of West Virginia to file the supplemental answer be and the same is hereby granted; and that the averments in

such answer be and the same shall be considered as traversed by the State of Virginia; that the subject matter of the supplemental answer as traversed be at once referred for consideration and report to Charles E. Littlefield, Esq., the Master before whom the previous hearings were had, with directions to hear and consider such evidence and testimony as to the matters set forth in the supplemental answer as the State of West Virginia may deem advisable to proffer and such counter showing on the part of the State of Virginia as that State may deem advisable to make. The report on the subject to embrace the testimony so taken and the conclusions deduced therefrom as well as the views of the Master concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous decree of this court. Nothing in this order to vacate or change in any manner or in any particular the previous decree, and the same to stand wholly unaffected by the order now made or any action taken thereunder until the examination and report herein provided for is made and this court acts upon the same. It is further directed that the proceedings before the Master be so conducted as to secure a report on or before the second Monday of October, 1914.[1]

State of North Carolina v. State of Tennessee.

Supreme Court of the United States, 1914.

[235 *United States,* 1.]

Slick Rock Basin and Tellico Basin sections of the boundary line between North Carolina and Tennessee located and defined in accordance with the judgment of a commission appointed by both States in 1821 and ordered to be marked by commissioners to be appointed under decree in this case.

There being a question as to the exact location of this part of the boundary line and both States having in 1821 united in appointing a joint commission and having agreed to abide by its judgment, the question in this case is to determine what that judgment was.

Marks on numerous trees along the disputed line similar to marks on trees along the undisputed line given great weight in this case as evidence of location of the continuous line referred to in the judgment of the Commission.

When States enter into an agreement giving commissioners the power to exercise judgment as to exact location of the boundary between them, they must suppose that such judgment will be exercised as to disputed locations and that when exercised it shall be binding upon them both.

*2 As the Cession Act of North Carolina of 1789 under which that State * ceded the western part of its territory to the United States and which was adopted by Congress was general in terms and necessarily demanded definition of the line both for purposes of private property and political jurisdiction of the States embodying such territory, an agreement made by the States to settle the exact line was in conformity with the act and did not require further consent or of sanction by Congress, nor was it in conflict with Article I, § 10, Clause 3 of the Federal Constitution prohibiting agreements between States without such consent.

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[1] For the succeeding phase of this case see *Virginia* v. *West Virginia* (238 U. S. 202), *post,* p. 1706.—Editor.

THE facts, which involve the location of a part of the boundary line between the State of North Carolina and the State of Tennessee, are stated in the opinion.

Mr. Thomas W. Bickett, Attorney General of the State of North Carolina, and *Mr. F. A. Sondley,* with whom *Mr. Theodore F. Davidson* and *Mr. C. B. Matthews* were on the brief, for complainant.

Mr. Charles T. Cates, Jr., with whom *Mr. Frank M. Thompson,* Attorney General of the State of Tennessee, *Mr. T. E. H. McCroskey* and *Mr. Samuel G. Shields* were on the brief, for defendant.

By leave of court, *Mr. W. D. Spears* and *Mr. L. N. Spears* filed a brief in behalf of Theodore Cobb *et al.*

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit in equity instituted by the State of North Carolina, as complainant, against the State of Tennessee, as defendant, for the purpose of having settled and determined the true location of part of the boundary line between the two States.

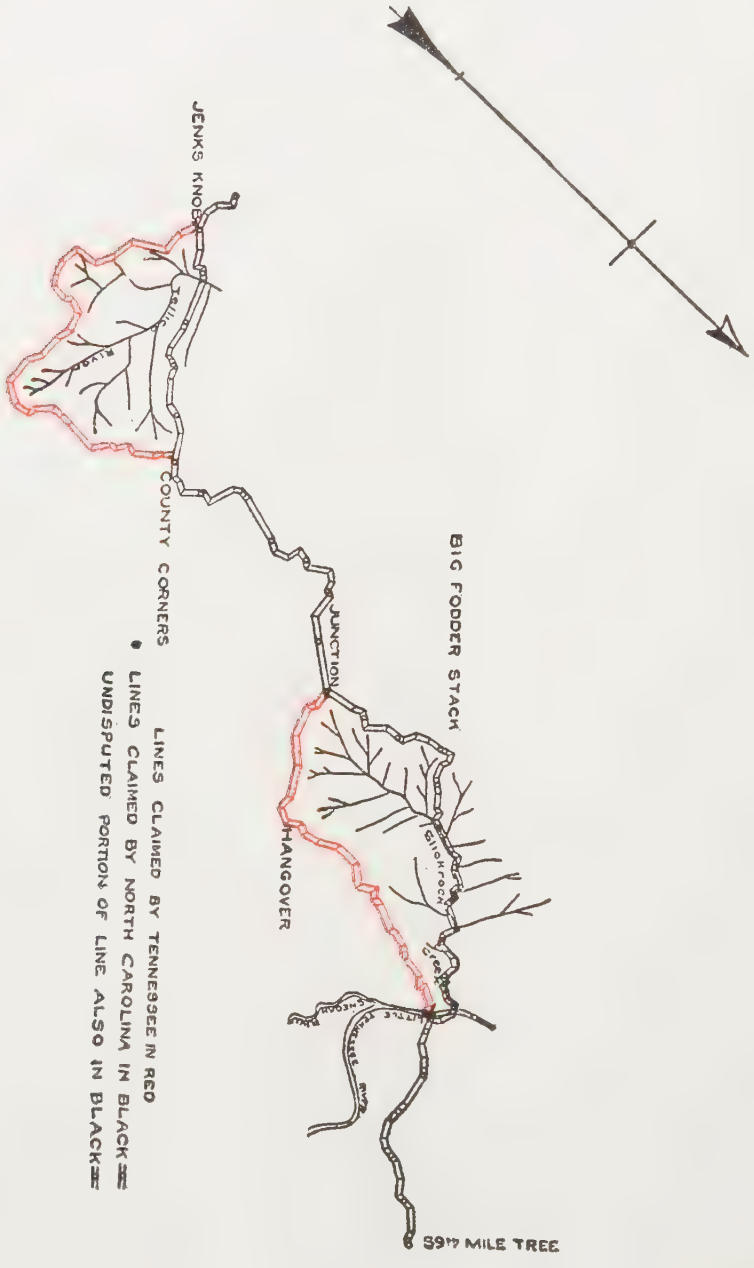
The pleadings consist of the original bill as amended, answer to the
*3 same, cross bill, and replication. Their * allegations need not be detailed. They accurately present the controversy between the parties and the relief prayed by each of them.

The controversy concerns only a part of the line between the two States called, respectively, the Slick Rock and Tellico basins or territories. The contentions of the States are exhibited in general outline by the map on the next page.

It is alleged by North Carolina "that dispute and controversy have arisen as to the true location of the State line between the extreme height of the mountain northeasterly of Tennessee River and the main ridge thereof southwesterly of the river" and she "has always believed and acted upon the belief, and alleges the fact to be, that the line between these points descends from the extreme height of the mountain northeast of the river to the river, crosses the river to a point in the southwest bank thereof just west of the mouth of the stream known as Slick Rock Creek, follows the creek a short distance to a ridge leading up to the main ridge, follows said ridge up to the summit, known as Big Fodderstack Mountain, and follows the main ridge thence to the junction of the Big Fodderstack and Hangover leads, and thence follows the main ridge of Unaka Mountain southwesterly."

Tennessee denies that the line described by North Carolina is the true boundary line, alleges that North Carolina at the time of filing her original bill "had not definitely determined how much of said boundary line she would dispute," alleges an extension of "the limits of the disputed zone," that complainant does not allege that the boundary as run and marked by the commissioners in 1821 (their appointment and action will be referred to hereafter) follows other than the extreme height of the mountain, which is agreeably to the cession act of 1789 (given hereafter), and expresses a willingness that the line should be so

*4


JENKS KNOB
COUNTY CORNERS
JUNCTION
BIG FODDER STACK
HANGOVER
39TH MILE TREE
LINES CLAIMED BY TENNESSEE IN RED
LINES CLAIMED BY NORTH CAROLINA IN BLACK
UNDISPUTED PORTION OF LINE ALSO IN BLACK

*5 marked and established in the * orders of this court, and denies that it can be established agreeably to the cession in any other place than along the extreme height of the mountain from the Tennessee River.

Further, Tennessee "denies that there is any uncertainty in regard to that part of the boundary line northeast of the river, and avers that said boundary line northeast of the river runs, and was so marked by the commissioners in 1821, down the crest of the main ridge of the mountain, which gradually lowers as it approaches the river, and on said line near to or on the bank of said river, about a half a mile above the mouth of Slick Rock Creek, a pine or hemlock tree was marked as a 'fore and aft tree,' which said tree is still standing, and is recognized as a 'fore and aft,' boundary line tree bearing the marks placed thereon by the commissioners in 1821, and described in the North Carolina Confirmatory Act and the report of said commissioners, hereafter shown." And avers "that said boundary line as described in said Cession Act of 1789, and run by said commissioners in 1821, crossed directly over the Tennessee River from said 'fore and aft tree' to the crest of the main ridge of the mountain, which is known as the Hangover ridge or lead—and which runs from the Stratton Bald northeasterly to the river, lowering somewhat as it approaches the river, where it ends or terminates in a bluff practically opposite said marked 'fore and aft tree,' thence along the crest of said Hangover ridge or lead to said Stratton Bald and the junction of Hangover with Fodderstack, the Fodderstack ridge, however, being several hundred feet lower than said main or Hangover ridge."

To these contentions the proof is directed, the record of which is voluminous. Besides other evidence, it is replete with the disputes of experts and of opposing deductions from their testimony. These, however, have their *6 determination if not their reconciliation in certain dominating * elements upon which our judgment may be rested.

The territory constituting the State of Tennessee was ceded to the United States by North Carolina in 1789. In the act of cession the boundary line was, as described, from the French Broad River westerly as follows: "Thence along the highest ridge of the said mountain [Iron Mountain] to the place where it is called Great Iron Mountain or Smoky Mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of such mountain to the southern boundary of this State." A deed was made by North Carolina, in pursuance of the act of cession, in 1790 which followed the same description, as did also the act of Congress accepting the cession; also the constitution of the State of Tennessee.

In the year 1796 North Carolina passed an act appointing commissioners to settle the boundary line between the State and the State of Tennessee. The latter State also appointed commissioners with similar authority. In pursuance of the authority the commissioners appointed by the States settled the line from the east to a point on the Great Iron or Smoky Mountain west of the Pigeon River, marked by a stone set up on the north side of the Cataloochee Turnpike road, about due north from the present town of Waynesville, in Heywood county, North Carolina, and about six miles east of the point where the Tennessee River passes through the mountain range, leaving the line to the southern boundary of the States unmarked.

Subsequently each of the States (North Carolina in 1819, Tennessee in 1820) passed acts appointing commissioners, to meet with commissioners appointed by the other "and with them to settle, run and mark the boundary line be-
*7 tween" the States "agreeably to the true intent * and meaning" of the cession act. In the act of North Carolina it was provided that "this State will at all times hereafter ratify and confirm all and whatsoever the said commissioners, or the majority of those of each State, shall do, in and touching the premises, and the same shall be binding on this State"; and Tennessee enacted "that whatsoever the said commissioners, or those appointed by each State shall do in and touching the premises shall be binding on this State."

Three commissioners were appointed by each State, who met and proceeded to the execution of their duties and made report thereon to the respective States as follows:

"Having met at the town of New Port in the State of Tennessee on the 16th day of July A. D. 1821, to settle, run and mark the dividing line between the two States, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord, 1799, to the Southern Boundary of the said States, Respectfully Report, That we proceeded to ascertain, run and mark the said dividing line as designated in the XIth Article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of General Assembly of the State of North Carolina, entitled 'An act for the purposes of ceding to the United States of America certain Western lands' therein described, passed in 1789:—Which said dividing line as run by us, Begins at a stone set upon the north side of the Cataloochee Turnpike road, and marked on the West Side *of* Ten. 1821; and the East side N. C. 1821, running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian Town of Tellassee, crossing Porters gap at the distance of twenty-two miles from the beginning; pass-
*8 ing Meig's boundary line at * thirty-one and a half miles:—the Equonettly path at fifty three miles;—and crossing Tennessee River at the distance of sixty five miles from the beginning. From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill Towns, near the head of the West fork of Tellico River, and at the distance of ninety three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up, marked Ten. on the West side and N. C. on the East side; and where a Hickory tree is also marked on the South side Ten. 101 m. and on the North side N. C. 101 m. being one hundred and one miles from our beginning. From thence a due course South two miles and two hundred and fifty two poles to a Spruce Pine on the North Bank of Highwasse River, below the mouth of Cane Creek; thence up the said River the same course about one mile, and crossing the same to a Maple marked W. D. and R. A. on the South bank of the River; Thence continuing the same course due south Eleven miles and two hundred and twenty three poles to the Southern Boundary line of the States of Tennessee and North Carolina; making in all one hundred and sixteen miles and two hundred and twenty three poles from our beginning; and striking the

Southern Boundary line twenty three poles West of a tree in said line, marked 72 m.—Where we set up a square post marked on the West Side Ten. 1821; on the East Side N. C. 1821; and on the South Side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies
*9 this Report, and which plats and * Report are certified by us in Duplicate, one for each of said States, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina."

Each State ratified the line located by the commissioners, following in their respective enactments the description of the report of the commissioners, and North Carolina "fully established, ratified and confirmed" it "as the boundary line between the States of North Carolina and Tennessee forever"; and Tennessee "ratified, confirmed and established" it "as the true boundary line between this State and the State of North Carolina."

The instructions to the commissioners were "to settle, run and mark ["remark" are the words of the Tennessee act] the boundary line" between the States. The commissioners executed the duty and reported "that we proceeded to ascertain, run and mark said dividing line." The report gives the beginning and end of the line and the intermediate courses and objects and concludes as follows: "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile-marked at the end of each mile; agreeably to the plats which accompanies this report; and which said plats and reports are certified by us in duplicate, one for each of said States, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina."

Each State by its legislature confirmed the report and declared the line as settled and run the boundary line between them, and, it is to be presumed, after due consideration.

The immediate question, therefore, is, Where was the line run? And the answer would necessarily seem to be determined by the monuments, courses and distances, and, if these in any way conflict, by the line as marked
*10 * by the commissioners if it can be ascertained, and the plats which accompanied the reports certified in duplicate.

On the report of the Commissioners no controversy was raised for years. It seemed to be certain, or rather was accepted as proof of what we may call for convenience the North Carolina contention. Tradition, supported, we think, by preponderating testimony, sustains it; and as early as 1836 it received some recognition from the legislature of Tennessee. In that year the State constituted a land district called the Ocoee District and provided for laying it out into townships, fractional townships, etc., and also provided for the entry and granting of the lands. The surveyor-general of the State, in accordance with the provisions of the legislation, surveyed and platted the lands and the plat shows that he made Slick Rock Creek the eastern boundary of the district. North Carolina surveyed the lands in the disputed territory in 1851 and made grants in 1853.

Upon an entry made in 1882 under laws passed by Tennessee and a grant

from said State in 1892 the first judicial controversy arose over the boundary line and the contention of Tennessee was sustained. *Belding* v. *Hebard,* 103 Fed. Rep. 532.

The opinion in the case was delivered by the late Mr. Justice Lurton, then a judge of the Circuit Court of Appeals, and exhibits the usual care and ability of that learned Justice. He enumerates the contentions of the parties, the elements of the contentions, compares and weighs the evidence adduced for their support and concludes as follows (p. 546):—

"There has been, on the evidence in this record, no such long and continued recognition or acquiescence in the tentative line on Slick Rock creek as to justify this court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary. The conclusions and
*11 findings of the * master upon the principal points in the case are not shown to have been so plainly erroneous as to justify us in overturning his conclusions as to the existence of the marked state-line trees on the Hangover, nor as to the fact that the Hangover was palpably the 'main ridge' called for in the commissioners' report and survey.

"The case, on the whole, is one not free from doubts engendered by the existence of the marked line on Slick Rock creek and its apparent recognition by the Tennessee surveyor general as the state line. The result reached by the special master, and confirmed by a most careful and conscientious trial judge, is a result which on the whole is most consonant with the calls in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the circuit court. The decree will therefore be affirmed."

The antagonism of the evidence to the North Carolina contention is put with more emphasis in *Stevenson* v. *Fain,* 116 Fed. Rep. 117, where, considering the controversy as to Tellico territory, Mr. Justice Lurton, again speaking for the court, said (p. 156):—

"In *Belding* v. *Hebard,* 43 C. C. A. 296, 103 Fed. Rep. 532, we had occasion to ascertain a portion of this dividing line, a few miles northeast of the part now in dispute. In that case we had evidence of two different lines, both probably run and marked by the joint commission. The line called the 'Slick Creek' line was the better marked line, but was a plain departure from the call to follow the 'main ridge.' There was an old marked line on the 'main ridge,' and, though not so well marked, had the great advantage of being supported by the calls for course and the call for the extreme height of the 'main ridge.' Under the evidence, he held the latter to be the line 'run and marked' by the
*12 commission of 1821, and adopted by the * confirmatory acts of both States. In that case, as in this, we were confronted with the fact that the Tennessee Cherokee survey had stopped at the Slick Creek line, and in that way recognized that as the line. But upon the whole case we held that the evidence relied upon to pull the line away from the 'extreme height' of the 'main ridge' was insufficient. The marked difference between that case and this is, first, in the fact that the 'main ridge' called for in the confirmatory acts of 1821 was far more clearly ascertained than in the present case; and, secondly, there was in that case evidence that two lines had been run and marked and old state-line marks shown on both lines. The call for the 'main ridge' was, therefore,

supplemented by the existence of artificial monuments, and this turned the scale over the other, although the more plainly marked line."

The "main ridge" and the "extreme height" thereof were considered by the court as dominant criteria and that the calls of the cession act and of the confirmatory acts of the State and the line run by the commissioners established Hangover to be the main ridge, and yet it was said, in estimate of opposing evidence, the case was not free from doubt. And in affirming the judgment, deference was expressed to the finding of the special master and Circuit Court.

We need not pause to weigh the evidence in that case. It is reproduced in this, but here there is further evidence which gives different probative quality to the circumstances which were considered controlling in that case. It may be true,—indeed, it is so alleged by complainant—that the boundary line between the two States may be generally described as following the main ridge or water-shed of the Allegheny Mountain range, but it has many local names and the topography of the country made it far from indubitably clear where the boundary line of the States should be located. Commissioners were
*13 hence * appointed to locate it, and their appointment and the controversies and the litigation which have arisen demonstrate that there was room for a choice and judgment of location—to be specific, of ridges. The States, we have seen, agreed to abide by the judgment of the commissioners, and to ascertain their judgment then is, as we have said, the inquiry in the case.

The commissioners reported that they had distinctly marked the dividing line run by them in its whole length "with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report, and which said plats and Report are certified by us in Duplicate, one for each of said States, in the same words, marks and figures." These plats were not in the *Hebard Case*.

According to the report of the commissioners, the plat was certified in duplicate, one for each State. It may be that the one filed with North Carolina was lost or destroyed when the Capitol building of the State was destroyed in 1832; that filed with Tennessee was discovered in 1903 or 1904 by the State Archivist among papers supposed to be worthless. Its authenticity is not questioned.

In November, 1910, a book purporting to be the field notes of W. Davenport, the surveyor who accompanied the commissioners, was found by his grandson in an old desk or sideboard which belonged to Davenport in his lifetime. The first three pages of the book are in the handwriting of Davenport. Other pages of the book are not in his handwriting but in that of his wife, who often acted as his amanuensis. However, here and there are corrections by Davenport. The original book was exhibited at the argument and showed the following:

"W. Davenport's Field Book, July 18th, 1821.

"July 19th, 1821, began at the Catalucha track to run the line between
*14 the State of North Carolina and Tennessee. * Marked a rock there on North Carolina side N. C. 1821 and on the other side T. E. N. 1821—and runs with the line that J. McDowell, M. Matthews and D. Vance run in the year 1799, and runs with said line about 2 miles and a half to where they

stopped." Then follow the courses and distances, with trees by name of kind and other physical objects.

These documents are variously interpreted by the experts of the parties. To detail and compare these interpretations and the arguments in support of them would be a tedious task and would have to be very extensive to adequately represent their strength. We have estimated them, but consider that general comment rather than specific review is sufficient. The documents undoubtedly have inaccuracies and fault may be found with them, but allowing for it they have a direction and concurrent strength which cannot be resisted when combined with other testimony, and demonstrate that the commissioners did not locate the dividing line on the Hangover ridge but located it along Slick Rock Creek to Fodder Stack. Their report agrees with such line and the local topography justified its selection. The dividing line as run by them, they reported, began at "a stone set upon the North side of the Cataloochee Turnpike road, running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwesterly on the extreme height thereof to where it strikes Tennessee River . . . and crossing Tennessee River at the distance of Sixty-five miles from the beginning." Thus far there is no dispute or uncertainty. "The summit" of the mountain and its "extreme height" should determine the locality of the line and the Tennessee River at a distance of sixty-five miles from the beginning. The next call has no such certain and conspicuous witness. The river is
*15 crossed, and thence the line runs "to the main ridge" and then along * the "extreme height" of it. The words of the call suppose an interval between the river and the "main ridge" whose extreme height thereafter is to be followed,—to be definite, a course up Slick Rock Creek to Fodder Stack. But granting that it could be literally satisfied without supposing such an interval, that is, connecting immediately with Hangover ridge, we must resort to the evidence to resolve the conflict of suppositions. We find the first established by the evidence which we have referred to and the marks on the trees. And these marks have of themselves great strength of proof, irresistible strength when combined with the other testimonies. They are the same in character as those on the undisputed part of the line, made, therefore, to define the continuity of the line, and the report explicitly states that the line was so defined in continuity—marked "in its whole length." We certainly cannot consider that a few trees—two or three only—identified as "State-line trees," marked on Hangover ridge satisfy this statement or determine that a line along that ridge was the ultimate one selected and the other but tentative, notwithstanding there were found on it from the river to Fodder Stack twenty-seven marked trees and from the latter point to the junction about as many more. Conjecture against this we cannot indulge. Imagination is not proof, and, we repeat, whatever might be said of any particular piece of evidence standing by itself, their union and concurrence amount to demonstration. And, we repeat, it must have been supposed by the States when they constituted the commission that judgment would have to be exercised, and, when exercised, should be binding. The contention of North Carolina is, therefore, sustained by the proof as to Slick Rock basin.

But it is contended by Tennessee that if the commissioners located such line the location was a departure from the cession act and the act of Congress

adopting it and that such line not having received the consent or sanc-
*16 tion * of Congress is invalid and in conflict with Article I, § 10, Clause 3 of the Federal Constitution providing that "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State," etc. If the fact of such departure could be conceded the conclusion might be disputed. *Virginia* v. *Tennessee*, 148 U. S. 503. But the fact cannot be conceded. The cession act is very general and necessarily demanded definition to satisfy the requirements of a boundary line, a line not only necessary to mark private property but political jurisdiction. This was realized and commissioners were appointed to run and settle the line exactly. Their work as executed was confirmed by the States.

The considerations which determine decision upon the contentions of the States as to the Slick Rock basin apply to the Tellico territory. Indeed, they make more strongly against the Tennessee contention. Without the newly discovered evidence the judicial judgment was adverse to that contention. *Stevenson* v. *Fain, supra.* The judgment is fortified by the evidence in this case. The comments of the court in that case and the considerations which have been expressed in this are sufficient to disclose the grounds of deciding that North Carolina is also right in its contention as to the Tellico territory and in the relief sought by its bill.

A decree should be entered adjudging that the disputed part of the boundary line between the States of North Carolina and Tennessee which was run by the commissioners appointed by the respective States in 1821 and who made report thereof dated at Knoxville, Tennessee, August 31, 1821, descends from the extreme height of the mountain northeast of the Tennessee River, crosses the river at a distance of sixty-five miles from the beginning to a point on the southwest bank thereof just west of the mouth of the stream known as Slick Rock Creek, follows the creek a short distance to a ridge leading up
*17 * to the main ridge, follows said ridge up to the summit known as Big Fodderstack Mountain and follows the main ridge thence to the junction of the Big Fodderstack and Hangover leads, and thence follows the main ridge of the Unaka Mountain southwesterly, according to the plat exhibited with this opinion. And, further, that commissioners be appointed to permanently mark said line.

The cross bill of the State of Tennessee should be dismissed.

Counsel for the respective States are given forty days from the entry hereof to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the States.

MR. JUSTICE DAY took no part in the consideration and decision of this case.[1]

[1] For the final phase of this case see *North Carolina* v. *Tennessee* (240 U. S. 652), *post*, p. 1728.—Editor.

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1915.

[238 *United States*, 202.]

This controversy being one between States, referred to this court in reliance upon the honor and constitutional obligations of the parties, it has been determined only after the amplest opportunity for hearing and with full recognition of every existing equity.

*203 West Virginia is entitled to have the assets in the Virginia sinking fund * and those specifically appropriated for payment of the debt applied in reduction of her share of the debt in the same proportion (23½%) as she is liable therefor.

The proper date for the division of the assets in the sinking fund and the taking account of the indebtedness to be divided between Virginia and West Virginia is January 1, 1861, as fixed by the contract.

In proving market value, accredited price-currents, lists and market reports, including those published in trade journals and newspapers which are considered trustworthy are admissible in evidence.

Shares of stock represent the proportionate interest of the shareholders in the corporate enterprise; and a rule that this interest should, in the absence of supporting testimony, be taken as actually worth the par of the shares would be artificial, and not justified by any exigency in the administration of justice.

An asset consisting of a debt due in a Confederate State which was paid in full in Confederate money should not for that reason be valued in adjusting accounts as of 1861 at less than the face value.

In estimating the value of bank stocks at book value an allowance of five per cent. for liquidation and realization is proper.

After considering all the exceptions to the Master's second report in this case, *held* that there should be deducted from West Virginia's share (23½%) of the principal debt of Virginia on January 1, 1861, already fixed, 220 U. S. 1, 35, at $7,182,507.46, the same proportionate part of the value of the assets in the sinking fund on that date and retained by Virginia amounting to $2,966,885.18, so that West Virginia's net share of the debt, is now fixed at $4,215,622.28 exclusive of interest.

A contract is to be interpreted according to its true intent although varied conditions may have during the lapse of years varied the form of fulfilment; in this case there are no equities which destroy the contract claim.

In a contract between sovereign States the questions of whether the debtor party is liable for interest on ascertainment of the amount due and rate of interest and period from which it should be computed are to be determined by the fair intendment of the contract itself.

It is not in derogation of its sovereignty that a State be charged with interest if the agreement so provides.

A contract on the part of a State to assume an equitable proportion of an interest-bearing debt means the taking over of the liability for interest as well as principal.

*204 In determining what rate of interest West Virginia should pay on the * proportion of the debt of Virginia assumed, the action of Virginia in regard to interest on the debt should be considered and under all the circumstances of the case *held*, in fixing the equitable proportion of West Virginia, that her part of the principal should be placed on a three per cent. basis as of July 1, 1891, with three per cent. per annum interest from that date, and with four per cent. per annum interest from July 1, 1861, to July 1, 1891, making a total of interest to July 1, 1915, of $8,178,307.22 and the total of the debt $12,393,929.50.

The decree shall provide for interest on five per cent. per annum on the total amount awarded by the decree from the date of entry.

THE facts, which involve the final adjustment between Virginia and the State of West Virginia and the determination of the equitable proportion of the debt of Virginia which the State of West Virginia agreed to assume and the liability of the latter for interest thereon, are stated in the opinion.

Mr. Holmes Conrad and *Mr. Sanford Robinson* for the bondholding creditors.

Mr. Randolph Harrison, with whom *Mr. John Garland Pollard,* Attorney-General for the State of Virginia, and *Mr. Wm. A. Anderson* was on the brief, for complainant.

Mr. A. A. Lilly, Attorney-General of the State of West Virginia, and *Mr. John H. Holt,* with whom *Mr. Chas. E. Hogg* was on the brief for defendant.

MR. JUSTICE HUGHES delivered the opinion of the court.

Upon the hearing in 1911, it was determined that the public debt of Virginia, as of January 1, 1861,—of which West Virginia agreed to assume 'an equitable proportion'— amounted to $33,897,073.82; that, in view of a reduction secured by Virginia and with the consent of her creditors, the amount to be apportioned was $30,563,861.56; that the apportionment should be made ac-
*205 cording to the estimated value of the property of the * two States at the time of their separation, June 20, 1863; and that upon this basis the proportion of West Virginia was 23.5 per cent, making her share of the principal of the debt $7,182,507.46. While the fundamental issues were thus decided, the controversy was not completely determined. In view of the consideration due to the character of the parties, and of the fact that the cause was 'a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned,' it was deemed advisable to go no farther at that stage but to afford opportunity for conference and adjustment. Accordingly, the question of interest was left open. *Virginia* v. *West Virginia,* 220 U. S. 1, 35, 36.

At the following Term, a motion on the part of Virginia that the court should proceed at once to final decree was denied in the light of the public reasons urged for the granting of further time. 220 U. S. 17. Another application of this sort was made by Virginia in November, 1913, and was again refused, and the cause was assigned for final hearing in April, 1914. 231 U. S. 89.

At that time, West Virginia as a result of her investigations asked permission to file a supplemental answer asserting the existence of credits, which she claimed as agaisnt the portion of the principal debt assumed, and also alleging grounds why she should not be charged with interest. Without expressing an opinion as to the propriety of allowing any of the described items of credit, and refraining from applying the ordinary and more restricted rules of procedure which would govern in cases between private litigants, the court granted the application to the end that this public controversy should be determined only after the amplest opportunity for hearing and with full recognition of every equity that might be found to exist. The subject-matter of the supplemental answer, considered as traversed by Virginia, was at once referred to Charles
*206 E. Littlefield, Esq., the Master before * whom the former proceedings had been had, with directions to hear and consider such pertinent evidence as

West Virginia might offer, and such counter-showing as Virginia might make, and to report the evidence with his conclusions deduced therefrom, together with a statement of his views 'concerning the operation and effect of the proofs thus offered, if any, upon the principal sum found to be due by the previous decree of this court,'—that decree meanwhile to remain wholly unaffected. 234 U. S. 117.

The Master's report has been filed, all the questions remaining to be determined have been fully argued, and the case is before us for final decree.

At the outset, the Master states that the extensive investigation involved in the later reference, with respect to the existence and the value of the various assets claimed as credits, was then prosecuted for the first time; and that so far as these items had been referred to in the earlier proceeding, it was for an entirely different purpose in the main. The Master reports that, in his view, the assets as detailed by him were applicable according to their value as of January 1, 1861, to the public debt of Virginia which was to be apportioned as of that date; that the value of these assets amounted to $14,511,945.74, of which West Virginia's share—23½ per cent.—would be $3,410,307.25. That if this amount were to be credited to her in reduction of her liability there should be offset certain moneys and stocks received by her from the Restored Government of Virginia aggregating $541,467.76, leaving a net credit to West Virginia of $2,868,839.49. This would reduce West Virginia's liability for principal from $7,182,507.46 to $4,313,667.97. The Master also concluded that West Virginia by virtue of her contract with Virginia is liable for interest from January 1, 1861, the date as of which her share of the principal is determined.

*207 * The ground for the allowance of the credits is that the moneys and securities in question had been specifically dedicated to the payment of the public debt. The moneys embraced cash in the sinking fund on January 1, 1861, and the securities had been purchased with proceeds of the debt. In 1838, the General Assembly of Virginia in authorizing the negotiation of loans provided that the stock of any joint stock company purchased with the money so borrowed, together with the dividends and other net income which might accrue therefrom to the Commonwealth, should be, and were, 'appropriated and pledged' for the payment of the interest and for the final redemption of the principal borrowed. Act of April 9, 1838, § 3. The constitution of 1851 directed the creation of a sinking fund which was to be applied to the debt (Art. IV, § 29) and, with respect to the State's stocks, thus provided: "The General Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the Sinking Fund, and be applied in like manner." *Id.*, § 30. In 1853, the legislature in establishing the sinking fund enacted a corresponding provision. Act of March 26, 1853, § 3. The question then is not one of the division of public property, merely because of its character as such. In the light of the origin and nature of the investments which the Master has reviewed and valued, and of the provisions of the constitution and statutes of the State, it is clear that these particular assets must be regarded as a fund specially devoted to the payment of the debt to be apportioned. In this view, West Virginia is entitled to have these assets taken into account in fixing the amount of her liability. It cannot be conceived that, being held for the undivided debt, it was intended that they should be applied exclusively to Virginia's share. As West

*208 Virginia is to bear 23½ per * cent. of the debt as it existed on January 1, 1861, she should be credited with a similar part of the fund, fairly valued, which had been pledged for its discharge. This equity is inherent in the obligation.

Both parties have filed exceptions to the report of the Master. The first two exceptions on the part of Virginia and of her committee of bondholding creditors, raise the same point,—that is, that the Master erred in selecting January 1, 1861, instead of June 20, 1863, (the date of separation), as the time as of which the value of the assets should be ascertained.

The question must be determined by reference to the terms of the contract between the two States (220 U. S., p. 28) upon which the liability is based. The undertaking is found in the provision of the constitution of West Virginia, which conditioned her admission into the Union. It is as follows (Art. VIII, § 8):

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

It is not to be doubted that this fixed January 1, 1861, as the date of cleavage with respect to the amount of the debt to be apportioned. It is not important that this date was prior to the separation of the two States. It was competent for the parties to fix a date, and they did so. The explanation of the selection may readily be found in the course of events, but it is sufficient to note that the selection was made. The ascertainment of the ratio of division must not be confused with the fixing of the amount to be divided. With regard to the former, we decided that we must look to the time when West Virginia became

*209 * a State, that is, in determining the general resources of the two States when the separation was effected. 220 U. S., p. 34. But we did not refer to that time for the purpose of ascertaining the indebtedness which was to be apportioned. That, it was definitely stipulated by the agreement, was the debt as it stood on January 1, 1861. *Id.*, p. 27. It follows that credits then existing were to be applied as of that date. Otherwise, the net amount which equitably was to be divided would not be determined. For example, it is not disputed that on January 1, 1861, there were over eight hundred thousand dollars in cash in the sinking fund. If the amount of the debt was to be ascertained as of that date for the purpose of equitable division, the sinking fund would have to be credited as of the same date, either in reduction of the debt or by crediting to each State her proper share according to her proportion of the debt. We know of no method of accounting which would settle and finally divide the debt as of January 1, 1861, and credit the sinking fund as of 1863. The same is true of the assets which had been specifically appropriated for the payment of the debt. The very ground of the credit of their value implies that it should be allowed as of the time fixed for the taking of the account of the indebtedness to be apportioned. The exceptions referred to cannot be sustained.

There is the further exception presented by the bondholding creditors (not by Virginia) to the refusal of the Master to hold that Virginia should not be charged with a value in excess of the price or amount that she actually received. The argument treats the ultimate realization by Virginia as the criterion. We

must again refer to the contract. It was not intended to create and it did not create for the two States a partnership or community of interest in these assets, or provide that they should be held, in trust by Virginia for West Virginia.
*210 It contemplated that each State should assume a fixed amount of * the debt, —not that there should be equitable co-ownership of a sinking fund to be liquidated for joint account. It did not look to a future accounting for moneys realized after the vicissitudes of civil war. There was to be a complete and final determination of West Virginia's 'equitable proportion' of the debt existing on January 1, 1861, and the account with Virginia was to be closed. As to this share of West Virginia, she was to establish her own sinking fund. There was, however, the equity arising from the fact that moneys and securities had been specially set apart for the payment of the debt. The facts as to this were well known and, as we have said, it cannot be supposed that West Virginia's fair and just proportion was to be fixed on a basis which denied her an appropriate share in the fund thus constituted, applying that which was meant for the whole only to Virginia's part. In view of the situation of the parties, and of the equitable adjustment which was contemplated, the question necessarily becomes one of valuation as of the selected date, and not solely of the amount realized in the later years.

It is argued that we should take the ultimate proceeds whenever they were received, and by discounting these upon a six per cent. basis find their value as of January 1, 1861 (assuming that to be the proper date), and credit the amount thus ascertained as the then value of the securities. This contention cannot be maintained. It would seem to be clear that such a method could only be justified in exceptional instances, in the absence of other and better evidence. The amount of the ultimate proceeds may have probative force in particular cases, according to the proved circumstances, but it is not the criterion of the value to be determined.

We are thus brought to the findings as to value. The various items, and the amounts allowed, are classified by the Master (following the arrangement of the supplemental answer) as follows:

*211 * Class A, Cash in sinking fund	$819,250.03
Class B, Stock of Richmond, Fredericksburg & Potomac Railroad Company,	323,167.36
Class C, Various other stocks, loans, etc (19 items)	7,352,594.65
Class D, Interest and dividends accruing prior to January 1, 1861, and subsequently received, (20 items)	345,554.80
Class E, Bank stocks	3,802,357.48
Class F, Stocks sold to Atlantic, Mississippi & Ohio Railroad Company	204,688.42
Class G, Stock of James River & Kanawha Company	1,664,333.00
TOTAL	$14,511,945.74

Virginia and the bondholding creditors do not except to these findings on the basis of January 1, 1861, with respect to Class A, Class C (items 5 to 18, inclusive), and Classes D, E, and F. They except to the findings as to the values of the securities in Class B. Class C (items 1 to 4, inclusive, and item 19), and Class G. West Virginia has filed exceptions to the findings as to the same items (save

item 19 in Class C) and also excepts to the findings of value in ten other instances. There are no exceptions on either side with respect to Class A and Class D.

To avoid repetition, the exceptions of both parties will be considered in connection with each item in dispute.

1. *Class B. Stock of the Richmond, Fredericksburg & Potomac Railroad Company.* Virginia held 2752 shares, of the par value of $275,200, out of a total stock issue of $1,116,100. This stock she still owns.

In connection with this item and the other valuations to which they except, Virginia and the bondholding creditors complain that the Master disre-
*212 garded published * quotations and based his findings upon book value and earnings. The quotations referred to appeared in the 'Richmond Dispatch' a newspaper of high reputation, and embraced reports of sales by brokers of good standing. It is unquestioned that in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence. *Cliquot's Champagne,* 3 Wall. 114, 141; *Fennerstein's Champagne,* 3 Wall. 145; *Chaffee* v. *United States,* 18 Wall. 516, 542; *Sisson* v. *Cleveland & Toledo Ry.,* 14 Michigan, 489; *Cleveland & Toledo Ry.* v. *Perkins,* 17 Michigan, 296; *Whitney* v. *Thacher,* 117 Massachusetts, 523; *Farley* v. *Smith,* 87 N. Car. 257; *Moseley* v. *Johnson,* 144 N. Car. 257; *Nash.* v. *Classon,* 163 Illinois, 409; *Washington Ice Co.* v. *Webster,* 68 Maine, 449; *Harrison* v. *Glover,* 72 N. Y. 451. We need not stop to review the decisions that are cited with respect to the extent of the preliminary showing of authenticity that is required (*Whelan* v. *Lynch,* 60 N. Y. 469; *Nor. & West. R. R.* v. *Reeves,* 97 Virginia, 284; *Fairley* v. *Smith, supra*) inasmuch as all the quotations asserted to have any bearing were received in evidence by the Master. We are now simply concerned with the question of their importance or weight, and whether they can be deemed to have the controlling effect that is sought to be ascribed to them.

Thus, with respect to the stock of the Richmond, Fredericksburg & Potomac Railroad Company, the published quotations were extremely meager. There was no stock exchange at Richmond and the transactions shown are very few. There is mention of two sales at 80 in November, 1860, but the number of shares sold is not stated or whether the sales were public or private. There are no reports of earlier sales or of any between that time and April, 1863. During this period, no quotations appear under the head of 'Bid' or 'Asked.' In December,
*213 * 1860, and also in the early part of 1861, under the head of 'Quoted' there is mention of 76½ and 77 'Last sales,' but nothing appears at these times under the head of 'Sales,' and the time and amount of the 'last sales' referred to are not given. In short, we have very infrequent transactions, of unknown significance, which fall short of furnishing a satisfactory indication of the value of the large block of stock held by the State.

The fact, however, that there was no sufficient proof of market value was not an insuperable obstacle to the making of a fair valuation. It was clearly proper to introduce evidence tending to show the intrinsic value of the shares. *Nelson* v. *First National Bank,* 69 Fed. Rep. 798, 803; *Crichfield* v. *Julia,* 147 Fed. Rep. 65, 73; *Henry* v. *North American Construction Co.,* 158 Fed. Rep. 79, 81; *Murray* v. *Stanton,* 99 Massachusetts, 345; *Industrial Trust, Ltd.,* v. *Tod,* 180 N. Y. 215, 232; *State* v. *Carpenter,* 51 Oh. St. 83; *Redding* v. *Godwin,* 44

Minnesota, 355; *Moffitt* v. *Hereford,* 132 Missouri, 513. For this purpose, resort was had to corporate accounts and reports of the company's affairs. With respect to the competency of the proof (in the case both of this company and of others, the value of whose shares was in question) in the absence of supporting testimony as to the facts recited, the Master refers in his report to the provisions of the statutes of Virginia. By the act of March 15, 1856, it was provided that every railroad corporation in which the Commonwealth was interested as a stockholder or creditor should annually make report to the Board of Public Works showing the condition of the property and containing full information with respect to capital stock, indebtedness, details of cost, physical characteristics, equipment, statistics of transportation, and a detailed statement with an appropriate classification of earnings and expenses. By the same act reports were required from canal and navigation companies. The Master says: "The
*214 State was a stockholder in all of these * corporations. By her statute she required the returns to be made on oath for the information of the public. She published them for public information as true, and the publications are now a part of her public records." As such they were deemed to be admissible against her in this litigation. They were, of course, not regarded as conclusive, and the question of their weight was reserved.

In the case of the road now under consideration, the book value, based on the cost of the railroad and net current assets, was practically 150 as of January 1, 1861. It had increased from 144.2 on March 31, 1859, to 150.4 on March 31, 1861. This book value was deduced from the annual trial balances as of March 31 in each year, purporting to show assets and liabilities. The greater part of the surplus was invested in construction. There was evidence that the cost was carried forward carefully from year to year, generally under classified headings and it did not appear to contain items that were not legitimate. The annual reports indicated the making of repairs and renewals to keep the road in good condition. Between 1848 and 1861, there were outlays amounting to $132,841.93, largely for added equipment and improvements, which had been charged to operating expenses. As to earnings, it appears that the road had been built about 1837. There had been paid in dividends to March 31, 1861, $1,099,280.64. There were no dividends in 1856, 1857, and 1858. One-half of the dividends in 1854, and the dividends of 1855, 1859 and 1860, were paid in bonds; they were deducted in arriving at book value. The dividends for the eleven years ending with 1860 averaged 5.09 per cent. The Master found that capitalizing these on a six per cent. basis would give a value of $84.83 per share. He concluded that a fair estimate was to take the average of the book value and this 'earning value' as indi-
*215 cated by the dividends, or 117.43 per share. This gave * for the total holding of the State a value of $323,167.36, which the Master allowed.

West Virginia excepts to the finding upon the ground that the book value of 150 per share should have been taken. This would make a difference in the total value of the stock of $89,642.64 or in the amount of West Virginia's credit of $21,063.68.

The exception is not well taken. It is urged that the book value represents actual value where books are correctly kept. This is not necessarily true, as books may be said to be correctly kept, in a sense, when they truly state the items set forth. But cost carried forward may not be the same as present value. De-

spite repairs and renewals, a suitable allowance for depreciation may not have been made. It would be too much to say that there is any controlling presumption and it clearly would not have been just to value the shares on a statement of book cost and surplus without taking into consideration the earning capacity. It is also complained that if the dividends for fifteen years (from 1850 to 1864) had been taken the average would have been higher; but this included dividends after 1861 paid in Confederate currency. It may be said that in this instance (as distinguished from others to which we shall presently refer) the Master arrived at his 'earning value' by taking the dividends declared instead of the actual net receipts, and that the latter exceeded the former. But the statement introduced gave the dividends; there was no separate computation of earnings, and these are not shown except as they may be computed from the trial balances which we have only for three years prior to March 30, 1861.

The Master sought to give proper weight to all considerations. His estimate upon this record could be only an approximation, but aside from any question as to the propriety of the precise method of calculation employed, *216 there can be no doubt that the result has support in the * evidence and does full justice to West Virginia. The exceptions are overruled.

2. *Class C. Items 1 to 4, inclusive.* These are railroad stocks and loans. In view of what has already been said, the exceptions may be disposed of briefly. The exception of Virginia and the bondholding creditors is substantially the same as that taken with respect to the item in Class B, and West Virginia insists that the full book value of the securities should have been allowed.

Item 1.—17,490 shares (par value $50) of the stock of the Orange & Alexandria Railroad Company. There was, in addition, a loan of $398,670.60 to this company, for which the Master allowed the face value.

There are no market quotations of this stock in 1860 or 1861. The company was incorporated about the year 1848. The book value was 50.27 in 1856, and 53.32 in 1860. This was deduced from the trial balance of 1856 and from the subsequent profits set forth by the reports to the State. There was no showing of allowance for depreciation. Dividends had been paid on preferred stock in 1857–9. It does not appear that any dividends were declared in 1860 or 1861, although apparently dividends to the amount of $31,604.09 had accrued prior to January 1, 1861, for which the State received dividend bonds; the time of the declaration of these is not given. The road was operated at a profit. Capitalizing the profits for five years ending with 1860 at 6 per cent. the Master found a value of 12.28, and taking the average of this value and the book value (53.32), he estimated the shares at 32.80, or at a total value of $573,672.

Item 2.—12,000 shares (par value $100) of the stock of the Richmond & Danville Railroad Company. Loan of $565,803.34 was allowed at face value.

There were published quotations of two sales, one in November, 1860, at 60, and another in January, 1861, at 57. The report does not give the number *217 of shares sold * or whether the sale was public or private. There is reference at various dates under 'Quoted' to 'Last sales,' but actual sales are not stated prior to 1863, except as mentioned above. The company was incorporated in 1847. The book value of the stock in 1860 (derived from the trial balance of 1856 and the later profits) was $137.37. The total stock was $1,981,197.50.

Apparently, only one dividend had been declared,—in 1859, at four per cent. But the profits were large. For six years they had been about nine per cent., and in 1860 they rose to about eleven per cent. The average for five years ending with 1860 was $179,782.12, which capitalized on a six per cent basis would give a stock value of $2,996,368.67. In view of this showing of profit the Master allowed the book value, with a deduction of five per cent. or 132.37 per share, making for the 12,000 shares held by the State an allowance of $1,588,440.

The exception of West Virginia in this instance merely relates to the deduction of five per cent. The Master treated the book value as virtually a 'liquidation value' and held that to arrive at a fair estimate of the actual value there should be some deduction for the expense of realization and this, upon the testimony of the expert for West Virginia, he fixed at five per cent.

Item 3.—3,856 shares (par value $100) of the Richmond & Petersburg Railroad Company. Dividend bonds amounting to $33,408 were allowed at face value.

There are no quotations under the head of 'Sales,' but simply references under 'Quoted' to 'Last sales' (from 64 to 57½), without particulars. The road had been incorporated in 1836 and its outstanding stock in 1860 amounted to $835,750. The book value at that time was 121.86. The dividends for four years had averaged nearly six per cent. The yearly profits averaged more, or $53,627.66, which capitalized gave a share value of 106.95. The Master took
218 the average of the book value and so- called earning value, allowing per share 114.40, or for the total of the State's stock, $441,126.40.

Item 4.—Stock of the Virginia Central Railroad Company. The State held on September 30, 1860, $1,891,670.68, in par value, of this stock, out of the then total stock of $3,152,854.23. By December 30, 1860, through additional payments on her subscription, the holdings of the State were increased to $1,927,382.57. There were also a loan of $90,032.82 and dividend bonds amounting to $143,508 for which face value was allowed.

There are quotations of two sales in November, 1860, at 50, but without details as to amount sold or character of sale. There are no other quotations of actual sales down to 1863, but simply references to 'Last sales,' as in the other cases above noted. The book value per share in 1860 was 131.16. Dividends were paid apparently to the amount of a little more than four per cent. in 1859, and nearly five per cent. in 1860. Profits for four years, ending with 1860, averaged $221,234.06 which capitalized at six per cent. gave a share value of 116.95. Taking the average of this and the book value, or 124.05, the Master allowed for the shares owned by the State, $2,390,918.08.

It must be concluded that with respect to these four securities (as in the case of the item in Class B) the quotations did not afford sufficient proof of market value to sustain the contentions of Virginia. On the other hand, in the absence of a more complete showing with respect to the physical property and its condition, the expenditures for maintenance and the extent of depreciation, it is wholly impossible to say that the book cost represented the actual value at the time to which the inquiry was addressed. Book cost, as we have said, would be a more or less doubtful criterion. After the lapse of so many years, an appraisal of this sort is obviously a matter of the greatest difficulty, and while the Master's

*219 valuation of these stocks may be regarded as a liberal one it is * probably as fair an estimate as could be made upon the facts presented.

3. *Class C. Items 6, 8, 10, and 17.* The exceptions in these instances are solely by West Virginia.

Item 6. Stock of the Alexandria, Loudon & Hampshire Railroad Company. It appeared that between the time of incorporation (1853) and January 1, 1861, Virginia had invested in this stock $993,248. There were further investments making the total in April, 1862, $1,017,248. All this stock was sold by Virginia on November 25, 1867, at five dollars a share, that is, for $50,862.40. The proportion of this price applicable to the stock held on January 1, 1861, was $49,662.05. This was the amount first stated as its value in West Virginia's exhibit of the values of items in Class C; but, subsequently, in the course of the proceedings the claim that the stock should be valued at par was advanced. The Master estimated the value at $35,096.85, that is, taking the amount as of January 1, 1861, which would produce the above stated sum of $49,662.05 at the date of sale.

The evidence, as West Virginia concedes, is meager. There are no market quotations. It does not appear that any dividends had ever been paid or that any profits had ever been earned. There is no statement of assets and liabilities, of traffic conditions, or of the results of operation. There is little knowledge of the physical condition of the road. West Virginia's contention is that the stock should be valued at par upon the ground that this is presumed to be the value and that Virginia had paid for it at that rate.

Statements may be found to the effect that par value is *prima facie* actual value (*Appeal of Harris,* 12 Atlantic Reporter, 743; *Moffitt* v. *Hereford,* 132 Missouri, 513), but if such statements can be deemed to announce a comprehensive rule, to be applied in the absence of evidence as to the property and *220 business * of the corporation, we cannot regard it as well founded. There is no such presumption of law and common experience negatives rather than raises such an inference of fact. We took this view in *Fogg* v. *Blair,* 139 U. S. 118, 127, when we criticized the supposition 'that the court, in the absence of averment or proof to the contrary, would assume that it (stock) was worth par, or had substantial value.' See also *Griggs* v. *Day,* 158 N. Y. 1, 23; *Warren* v. *Stikeman,* 84 App. Div. (N. Y.) 610; *Beatty* v. *Johnston,* 66 Arkansas, 529. Shares represent the proportionate interest of the shareholders in the corporate enterprise, and a rule that this interest in the absence of all supporting evidence should be taken as actually worth the par of the shares would be wholly artificial. There is no exigency in the administration of justice which requires or justifies such an extreme assumption.

In the present case, upon this record, it would be wholly improper to say that this stock was worth $993,248. Nor is there any evidence upon which we can ascribe value to it apart from the fact of the subsequent sale. West Virginia in claiming the credit had the burden of proving value, and it was not sustained save as value could be deduced from the amount of the proceeds. The exception must be overruled.

Item 8. Loan to Virginia & Tennessee Railroad Company.

In 1853 Virginia made loan to this company of $1,000,000, which was secured by mortgage. The loan was outstanding on January 1, 1861. In 1863, payments were made in Confederate money amounting to $886,685,—equal on a gold

basis to $97,601.46. These payments the Board of Public Works of Virginia attempted to repudiate by its resolution of February 4, 1868, upon the ground that the Second Auditor of Virginia had no authority to receive them. That the moneys were returned is not clearly established. The Master finding no *221 evidence of * the value of the loan aside from the fact that these payments had been made took their value (in gold), computed as of January 1, 1861, and allowed the sum of $84,799.90. West Virginia excepts upon the ground that the loan should have been taken at her valuation of $886,685.

The company was incorporated in 1836 under the name of the Lynchburg & Tennessee Railroad Company. In 1860 Virginia held stock of par value of $2,270,525 and her holdings were subsequently increased to $2,300,000. It is urged that the book value of the shares on June 30, 1860, was 99.90, but we have no statement of assets and liabilities or of net earnings. The only year for which the result of operation is given (the one preceding June 30, 1860) showed a loss. It does not appear that any dividends were paid prior to 1864, and then Virginia received $138,000, which the Master figures as being equivalent in gold to one-half of one per cent.

In 1861 interest had accumulated upon the loan above mentioned to the amount of $280,000. Between 1861 and 1863 payments were made aggregating this amount in Confederate currency, the gold equivalent being $91,986.33. This accrued interest was made the subject of separate claim by West Virginia and was allowed in Class D at the value (in gold) of the payments, as of January 1, 1861, that is, $86,133.63. And to this finding there is no exception.

In 1870 Virginia transferred her stock in this road and whatever interest she had in the loan, together with her interest in other stocks and loans, to the Atlantic, Mississippi & Ohio Railroad Company for $4,000,000, secured by a second mortgage for that amount, subject to a first mortgage of not more than $15,000,000 which was to provide for existing liens, new construction and repairs and improvements. The payment of the $4,000,000 was to be in instal- *222 ments of $500,000 each, the first of which was to * be made fifteen years later, in 1885. In addition to the stock and loan of the Virginia & Tennessee Railroad Company, there were embraced in this sale by Virginia 12,000 shares of the stock of the Norfolk & Petersburg Railroad Company, together with her claim for the unpaid balance ($163,000), and interest, of a loan of $300,000 to that company; 1,034 shares of the stock of the Virginia & Kentucky Railroad Company; and 8,035 shares of the stock of the South Side Railroad Company with the claim of the State upon an outstanding loan by the latter of $800,000. This last-mentioned loan (to the South Side Railroad Company) constitutes Item 9 in Class C, and was found by the Master to be of no value; and to this ruling there is no exception. Both that loan and the one, now in question, to the Virginia & Tennessee Railroad Company, were included in the tabulation of the securities transferred but no value was assigned to them. The terms of the sale as the Master well says "are strongly indicative of an abortive, profitless enterprise." He adds that, "after the lapse of ten years, and the expenditure of approximately $5,000,000 of new money," it "again met with shipwreck, and the State was able to save as salvage from the wreckage, and that apparently through the grace of the first mortgagees, only the sum of $500,000 in 1882." In the absence of any satisfactory evidence of value with respect to the stocks thus transferred, the Master in

connection with another item of claim to which we shall presently refer gave credit for this realization, discounted as of January 1, 1861, that is, for the sum of $204,688.42.

Upon this record it certainly cannot be assumed that the loan to the Virginia & Tennessee Railroad Company was worth par, and in fact West Virginia has claimed on this item not par, but $886,685, the amount which was subsequently paid in Confederate currency. Apart from this payment, we find no basis whatever for an estimate of value as of January 1, 1861. The payment itself
*223 cannot * be taken for more than it was worth in gold and the Master in making his allowance on that basis went as far as the proof justified.

Item 10. Loan to Norfolk & Petersburg Railroad Company.

This is the loan which we have mentioned in connection with the sale in 1870 to the Atlantic, Mississippi & Ohio Railroad Company. At that time it appeared that the unpaid balance was $163,000. On January 1, 1861, the loan amounted to $300,000, and West Virginia contends that the face value should be allowed. The doubtful character of the claim is indicated by the fact that in one of West Virginia's exhibits the loan is scheduled with the statement under the head of 'Value,' January 1, 1861,—'No claim—too indeterminate.'

As already stated, Virginia held 12,000 shares of the stock of this company; but we have no facts with respect to its condition, property, or operation, which would enable us to assign a value to the stock as of January 1, 1861. No net earnings are shown and for the year preceding March 31, 1861, it appears that the road was operated at a large loss.

On this showing we cannot say that the loan was worth its face. There is, in fact, nothing to support a valuation, save the moneys realized. The sum of $137,000 was paid in two instalments in 1867 and 1868, and the remainder of $163,000, with certain accrued interest, entered into the realization of 1882. The value of the total amount thus obtained, calculated as of January 1, 1861, or $108,415.45, was allowed. We find no ground for any larger credit.

Item 17. Claim against the United States.

Virginia made advances to the Government in aid of the War of 1812. These apparently were refunded but there remained a question as to interest. Virginia insisted that there was a balance of interest due on July 1, 1814, amounting
*224 to $298,369.74 which she claimed with * interest from that date. On the other hand, the United States held bonds of Virginia (which had been purchased by the Government as trustee for certain Indian tribes) amounting to $581,800, and also held $13,000 of bonds of the Chesapeake & Ohio Canal Company, guaranteed by Virginia. A settlement was effected under the Act of May 27, 1902 (c. 887, 32 Stat. 207, 235), by which February 11, 1894, was selected as the date of adjustment and the interest was calculated to that date on each side at six per cent. In the case of Virginia's bonds, the interest ran from January 1, 1861. The total claim of Virginia amounted to $1,723,582.53, and that of the Government (after certain credits of interest received and with the addition of $16,923.70 which had been paid to the Restored State of Virginia) amounted to a total of $1,723,577.03. The difference on this adjustment was only $5.50, which was paid to Virginia in cash.

West Virginia asked that there should be allowed, as an asset of the undivided State, the amount of this claim of Virginia against the Government to the

extent of the principal with interest to January 1, 1861, that is, $1,130,821.31,—to the end that West Virginia should receive in the final adjustment of its liability a credit of 23½ per cent. of this amount.

The Master noted that the mutual claims of Virginia and the United States had been adjusted as of a selected date (long past) when with interest they practically balanced each other. He concluded that this convenient method of ending the controversy did not necessarily involve a determination of the cash values of the claims upon either side. He decided not to allow West Virginia's claim by virtue of this settlement so far as it involved interest. He found, however, that the bonds of Virginia ($581,800) which entered into the settlement were embraced in the indebtedness which was to be apportioned. The Master
*225 thought, therefore, that as their full face value * was included in the aggregate of the debt with respect to which West Virginia was to be charged, an appropriate credit on their account should be made. For this purpose, he took the face of the bonds with the cash item of $5.50, or $581,805.50 in all, as received in 1903, and calculated the value of that sum as of January 1, 1861. This amount, to wit, $164,584.30, he allowed.

West Virginia excepts, insisting that the sum allowed should have been $1,130,821.31.

The proper disposition of this item, it would seem, is to treat the common asset as applied to the redemption of a portion of the common debt. That is, the claim of Virginia against the United States was devoted to the payment of the bonds of Virginia amounting to $581,800, which formed a part of the debt to be divided. It is equitable that West Virginia being charged with her established share of the whole debt should be credited with the same share of the reduction thus accomplished. This will properly be effected by including the amount of the face value of these bonds in the total sum, on account of which as equitably applicable to the debt, West Virginia is to receive credit. We find no warrant for the diminution of this allowance through such a calculation as that made by the Master. Virginia's bonds, as has been said, constituted the principal of the Government's claim as it existed on January 1, 1861, and were discharged accordingly. What remained of Virginia's claim against the Government—that is, of the common asset—was exhausted in the payment of the interest subsequently accruing upon the common debt, and if any equity exists with respect thereto, it is one to be adjusted in the disposition of the question of interest.

It follows that upon the item now under consideration there should have been allowed the sum of $581,800 instead of $164,584.30, making a difference of $417,215.70.

*226 4. *Class C. Item 19. Dividend bond, $149,984, of the * Richmond, Fredericksburg & Potomac Railroad Company.* The Master allowed this item at the face value.

The exception is taken by Virginia and the bondholding creditors upon the ground that the bond was paid in 1863 in Confederate money.

This, however, is not a case where there is resort to the subsequent realization as evidence of value. On the contrary, the railroad company, as the Master found, was operating at a profit. Its stock (Class B, *supra*), was valued at 117.43. The bond, upon the evidence, was a good asset at its face on January 1, 1861, and

was properly valued as such in the same manner as the loans included in Class C, Items 1 to 4.

5. *Class E. Items 1 to 4, inclusive. Bank stocks.*

The shares embraced in these items and the values fixed by the Master are as follows:

Farmers' Bank of Virginia, 9,626 shares at 102.89,	$990,419.14
Bank of Virginia, 13,766 shares at 71.49,	984,131.34
Bank of the Valley, 4,839 shares at 102.6,	496,481.40
Exchange Bank, 8,755 shares at 102.2,	894,761.00

In each case the Master took the book value with a deduction of five per cent. The sole exception is by West Virginia, who contends that the full book value should have been allowed.

It is urged that Virginia continued to own the shares and that no process of liquidation was necessary. But the deduction did not proceed upon the view that an actual liquidation was required. The Master's conclusion was based upon the unassailable ground that the book value only represented the amount which, according to the books, could be obtained from the assets upon a liquidation; that hence the book value did not represent the actual net value of the shares; and that this actual value could not be estimated without a proper allow-
*227 ance for the expense of realization. He made this allowance upon a * basis sustained by the evidence, and there is no reason for disturbing his finding.

6. *Class F. Securities sold to the Atlantic, Mississippi & Ohio Railroad Company.*

These embraced the stocks to which reference has been made in the discussion of Items 8 and 10 of Class C, *supra*. The Master, as stated, allowed for these—$204,688.42. West Virginia excepts because the Master did not allow either the book value of $4,276,044.39 or the sum of $4,000,000 for which the second mortgage, already mentioned, was given at the time of the sale in 1870. We have commented upon the lack of evidence with respect to the value of the shares of the Virginia & Tennessee Railroad Company and the Norfolk & Petersburg Railroad Company, two of the four companies in question; and also upon the fact that in the case of the third company, the South Side Railroad Company, a loan of $800,000 outstanding on January 1, 1861, was found by the Master to be of no value and no exception has been taken to the finding. With respect to both the company last mentioned and the remaining company, the Virginia & Kentucky Railroad Company, as well as in the case of the two others, the record discloses no facts with respect to condition, assets and liabilities, and results of operation, which can be deemed to furnish any adequate ground for a conclusion as to actual worth. The schedule of 1870, at the time of the transfer of these stocks to the Atlantic, Mississippi & Ohio Railroad Company simply gives par values and, as has been said, the purchaser of these stocks, and other items, executed therefor a second mortgage for $4,000,000 payable in annual instalments of $500,000 each, the first payment being postponed until 1885. We find in this transaction no proper basis for a valuation as of 1861. Notwithstanding the expenditure of large amounts upon the properties, the second mortgage proved to be worthless except for the sum of $500,000 paid in 1882
*228 * on the foreclosure of the first mortgage, and this payment it would seem

was not based upon the actual value of the property but was rather in the nature of a concession to assure a complete title without controversy. There is no warrant in the evidence for any greater allowance than that which the Master gave.

7. Class G. Stock of the James River & Kanawha Company.

The State held $10,400,000, in par value, of this stock, or 91.77 per cent. of the entire capital stock, at a total cost of $9,547,582.21. The Master allowed as its value $1,664,333. The exception is by Virginia, and the bondholding creditors, it being insisted that the stock had no value.

The record contains voluminous reports, statistics and testimony, with respect to this historic enterprise, showing the facts as to its development, the property which the company owned, and the course of its business. It would be almost impossible briefly to review these facts, and their recital at length would serve no useful purpose. The capital, as has been said, was mainly supplied by the State and by January 1, 1861, there had been completed approximately one hundred and ninety-five miles of the canal, from Richmond to Buchanan, with a branch of twenty-two miles to Lexington. There had been no dividends, save one of $10,092 in 1836. In addition to the original investment in the stock, there had been an increasing indebtedness to the State which amounted in the year 1860 to $7,560,214.44. As the company was unable to earn sufficient to pay the interest upon this indebtedness, the State under the Act of March 23, 1860, provided for an increase of capital stock and took in satisfaction of its debt (and to make specified provision for floating debt) 74,000 shares in six per cent. preferred stock. Upon the assumption that this exchange had been effected
*229 and that the debt of the State had been converted into capital, * eliminating the interest charge, it appeared that the net operating revenue in 1860 amounted to $151,000.14. If computed on the same basis, it appeared that the average annual net operating revenue for seven years, including 1860, would have been $115,554.21, and for twenty-five years, $111,800. It seems, however, that there were certain outstanding bonds amounting to $199,000 upon which the company was liable, and that to get the net earnings, exclusive of any return to the State, it would be necessary to deduct the annual interest upon this sum, that is, $11,940. The Master concluded that upon the evidence the only basis for computation of value was to take the average net returns for twenty-five years ($111,800), deducting this interest ($11,940), or $99,860. Capitalizing these earnings at six per cent. the value of the property was fixed at the sum above stated, to wit, $1,664,333. The master thought that this estimate was a liberal one in view of the fact that the computation did not make allowance for depreciation, and of the diminished returns of the succeeding years. But the basis chosen seemed to be the only one upon which he could reach a reasonable conclusion. In view of the property shown to have been owned by the company, and the evidence as to the results of operation, we think that the exception of Virginia and the bondholding creditors cannot be sustained and that the Master's appraisal should be accepted.

That West Virginia, after this painstaking investigation, was not dissatisfied with the result is apparently shown by the fact that in filing its exceptions to the Master's report, it took no exception to his finding as to this item. In its brief, however, in discussing Virginia's exception, West Virginia states that it 'now excepts' to the Master's finding because of his failure to allow $2,516,666 instead

of $1,664,333. While this might not be regarded as a formal exception which
*230 should receive consideration, we should * not be disposed to ignore it if it had merit, but should consider the objection in the same untechnical spirit in which the controversy has been dealt with from the beginning. But we do not think that the exception is well taken. The suggested value is reached by capitalizing the net operating revenue of a single year, that is, by taking the return for 1860 at the amount above stated, $151,000.14, which on a six per cent. basis would give a value of $2,516,666. This, however, makes no allowance for the interest charge of $11,940; and, further, we think it would be wholly unjustifiable in the light of the history of this company to capitalize upon the return of one year. It is objected, however, that the Master reached his result by taking the average net returns for a period of twenty-five years which included the early years of the undertaking, but if we take the net returns of seven years preceding September 30, 1860, as shown by the exhibit prepared by West Virginia's accountant, or $115,554.21, and deduct the interest charge of $11,940, there remains $103,614.21 as the annual net profit, exclusive of any return to the State. This sum capitalized at six per cent. would show a value of $1,726,903, a sum very slightly in excess of the Master's estimate. Having regard to the absence or allowance for depreciation, it cannot be said that West Virginia is entitled to have the estimate increased.

8. *Class G. Stock of the Manassas Gap Railroad Company.*

Virginia owned $2,105,000 of this stock in par value, out of a total of $3,322,164.67. The Master found no evidence upon which he could assign a value to this stock, and West Virginia excepts insisting that it should have been estimated to be worth par.

In the supplemental answer, a value was placed upon the stock at 25 per cent. of the par value in view of the lapse of time and the lack of clear evidence
*231 as to actual * value. Even this, however, cannot be regarded as more than a conjecture. It was shown before the Master that the road had been operated as far as Mt. Jackson and was in course of construction to Harrisonburg, but no satisfactory data were furnished as to the condition of property, liabilities, earnings, etc., upon which any finding of value could properly be made. It is, therefore, suggested that in the absence of proof to the contrary the stock should be presumed to be worth par, but, as already stated, no such assumption is justified. There was a failure of proof as to this item and the Master properly disallowed it.

9. Under her general exception, West Virginia raises two further objections which affect the credits to be allowed.

(1) It appeared that certain counties in West Virginia, after the organization of the State, paid taxes, fines, etc., to Virginia amounting to $180,264.45. Credit for this was asked by West Virginia, but was refused by the Master. He found that the circumstances under which this amount was assessed were 'involved in a great deal of doubt and uncertainty.' It appeared that a balance could not fairly be struck with respect to the sums thus paid without taking into consideration the expenses of the actual government of the counties in question for the maintenance of which it was raised. As the Master says: "The amount" (of these expenses) "however was not known. It may have been more, it may have been less than the amount paid in taxes." The record does not furnish any ground for the allowance of this item.

(2) The Master concluded that if West Virginia were credited with her proportionate share of the assets which have been valued, she should be charged with the moneys and securities which she received from the Restored Government of Virginia, to wit, $170,771.46 in money, and $370,696.30 in securities, making a total of $541,467.76. West Virginia makes no objection to the
*232 charge of the * securities but excepts to the ruling as to the money. There seems to be no doubt that the money was in fact received from the Restored Government of Virginia, and that it was money belonging to Virginia which was turned over to the new State. It would seem to be clearly equitable that, if the credits in question are allowed, this charge should be made.

10. The further exception is taken by the bondholding creditors (not by Virginia) to the failure of the Master to hold that Virginia was entitled to apply the assets, thus valued, to various obligations not embraced in the principal debt which, as heretofore determined, is to be apportioned. The contention thus urged is but a repetition in another form of the arguments which have already been considered in reaching the conclusion that these assets should be regarded as specifically dedicated to the discharge of the indebtedness to be apportioned, and that West Virginia in assuming an equitable proportion of that indebtedness was entitled to a credit accordingly. The exception cannot be sustained.

All the exceptions relating to the credits in question have now been considered. The values as thus ascertained are:

Class A		$ 819,250.03
Class B		323,167.36
Class C		
Allowed by Master	$7,352,594.65	
Increase in Item 17	417,215.70	7,769,810.35
Class D		345,554.80
Class E		3,802,357.48
Class F		204,688.42
Class G		1,664,333.00
TOTAL		$14,929,161.44

*233 * Credit to West Virginia of 23½ per cent. of $14,929.161.44 ..... $ 3,508,352.94
Less money and securities received by West Virginia from Restored Government of Virginia as found by Master.. 541,467.76
Net credit to West Virginia ..... $ 2,966,885.18

This would give as West Virginia's equitable proportion of the principal debt the sum of $4,215,622.28, as follows:

23½ per cent. of principal debt ($30,563,861.56) to be apportioned	$ 7,182,507.46
Deduct credit to West Virginia, as above	2,966,885.18
West Virginia's share of principal debt	$ 4,215,622.28

Interest. There remains the question of West Virginia's liability for interest. This liability is contested upon the grounds that the claim of Virginia has been unliquidated and indefinite, that interest is not recoverable as damages save on default in the payment of an amount which is certain or susceptible of ascertainment, that there was no promise on the part of West Virginia to pay interest, that unearned interest was not a part of the debt of which she agreed to assume an equitable proportion, and that in the absence of an express promise interest is not to be charged against a sovereign State.

All the questions thus raised may be resolved by the determination of the fair intendment of the contract itself. If liability for interest is within the scope of the agreement no objection can lie on the ground of uncertainty in amount, as the promise attaches to the amount found to be payable. In this view, also, no question would be involved as to an award of interest by way of dam-
*234 ages as distinguished from a recovery by virtue of the terms of the * under-taking. Nor can it be deemed in derogation of the sovereignty of the State that she should be charged with interest if her agreement properly construed so provides. The fundamental question is, What does the contract mean?

This subject has been discussed elaborately—from every possible point of view—in the comprehensive arguments which have been presented, but the considerations which must be deemed to be controlling are clearly defined and may be succinctly stated.

The subject-matter of the contract was a 'public debt.' That debt consisted of outstanding bonds. Some of these were redeemable at pleasure; but for the most part they were unmatured and had many years to run. These bonds provided for the payment of interest as well as principal; they were interest-bearing obligations. It is true that on January 1, 1861, there was interest due and unpaid, and apparently there were also some matured bonds; but these amounted to but a small fraction of the 'public debt.' The debt to which the parties referred,—as it existed prior to and on January 1, 1861,—was not a debt in the sense of a specific sum then due and payable, but manifestly was the liability evidenced by the outstanding obligations of which the promised interest was an integral part.

This being the subject-matter of the agreement, its express words have a clear significance. It was provided that West Virginia should *'assume'* her equitable proportion of the public debt. This was not an undertaking simply to pay a percentage of principal. West Virginia was to take upon herself a just share of the public burden represented by the bonds, and we cannot regard this provision as subject to an unexpressed limitation that interest should be excluded. A contract to assume an interest-bearing debt means the taking over of the liability
*235 for interest as well as principal. And the same is true *pro* * *tanto* of the assumption of an 'equitable proportion' of the debt. Both parties unquestionably contemplated that interest would accrue upon these bonds. They were making provision for payment and not looking to default. Certainly, Virginia was not expected to bear the burden of the interest accruing on the share to be taken by West Virginia. The very purpose of the contract was to secure—as between these parties—Virginia's exoneration with respect to that share. As it was plainly not the intention either that the bondholders should go without interest as to the proportion assumed by West Virginia, or that there should be left with Virginia

the entire burden of meeting the interest on the outstanding bonds while the principal was apportioned, it must follow that the assumption of an equitable share by West Virginia related to the liability for both principal and interest. We cannot read the contract otherwise.

Nor do we think that in the construction of the provision of the constitution of West Virginia (Art. VIII, § 8), which defines her engagement, the second clause can be ignored. After stating that an 'equitable proportion' of the public debt shall be assumed by West Virginia, it is provided that 'the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years.' If there could otherwise be any doubt as to what was embraced in the contract of assumption, this provision would dissipate it. It is true, as we have said, that this direction to the legislature did not undo the contract by making 'the representative and mouthpiece of one of the parties the sole tribunal for its enforcement.' But it throws a clear light upon what the parties had in mind. The 'accruing interest' had not escaped their attention. And it was because the payment of accruing interest was an essential part of the
*236 obligation to be assumed * in the division of the 'public debt,' that the legislature was enjoined to establish an adequate fund by which the assumed liability in its full scope would be discharged.

The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfilment. It is urged that there are equities to be considered, but we can find none which go so far as to destroy the claim. On the contrary, there is no escape from the conclusion that there was a contract duty on the part of West Virginia to provide for accruing interest as a part of the equitable proportion assumed, and that it would be highly inequitable as between the two States that Virginia as to her share should bear interest charges for these fifty years while West Virginia on her part should simply pay a percentage of principal reduced by the credits which have been allowed.

While liability for interest exists, there is still the question as to the rate at which interest should be allowed. Virginia, it appears, has not paid upon her estimated share the rate which was reserved in the bonds. This fact, we think, raises an equity demanding recognition. In fixing West Virginia's share of the principal, we took into account the fact that Virginia, by the consent of the creditors, had reduced her own share below the amount which it would have been upon the basis we found to be correct, and we gave appropriate credit to West Virginia on account of this difference. 220 U. S., p. 35. And it would not be proper to hold West Virginia to the rate of interest specified in the bonds when Virginia as to her share has made arrangement with the creditors for a lower rate. The provision that the share of West Virginia shall be an equitable
*237 proportion is the dominating principle of the * award, and while Virginia as we have held is entitled to enforce the contract, in the due performance of which her honor and credit are concerned, her action with respect to her own estimated share must be taken into consideration.

In 1866, the General Assembly of Virginia provided for the funding of

unpaid interest, on bonds issued prior to April 17, 1861, in bonds bearing the same rate of interest. It appears in the evidence that the bonds issued under this act for unpaid interest amounted to $6,576,913.60. It is also stated on behalf of Virginia that there was paid in cash from January 1, 1861, to December 31, 1871, on account of interest, the aggregate sum of $7,094,103.61, making a total of $13,671,017.21. Of these cash payments, $4,519,065.04 were paid in Confederate currency between January 1, 1861, and April 1, 1865, the equivalent of which in gold is stated to be $2,261,358.91, making the total money payments for interest during this period on a gold basis equal to $4,836,397.48.

By the Act of March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, made provision for the issue of new bonds which, as the bill in the present case sets forth, were to be "for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest," which accrued interest to the extent above mentioned had been funded in bonds issued after the War. The new bonds were to bear interest at the same rate as the old bonds,—for the most part, six per cent. For the remaining one-third, there was to be issued upon the surrender of the old bond, a certificate of even date with the new bond setting forth the amount which was not funded, that payment with interest would be provided for in accordance with such settlement as should be made between Virginia and West Virginia, and that the old bonds so far as unfunded were held 'in
*238 trust for the holder or his assignees.' Under this act as was said * in *Hartman* v. *Greenhow,* 102 U. S. 672, 679, "a large number of the creditors of the State, holding bonds amounting, including interest thereon, to about thirty millions of dollars, surrendered them and took new bonds with interest coupons annexed for two-thirds of their amount and certificates for the balance." It should be added that it appears that there were certain bonds aggregating $864,842.03 in principal, which were held by educational institutions in Virginia, for which Virginia issued new bonds in full without deducting one-third for West Virginia's share. It is testified that upon these last-mentioned bonds six per cent. interest has been paid continuously.

As it appeared that even under the measure of 1871 Virginia had assumed a heavier burden than she felt able to bear, other plans were attempted for the settlement of the state debt. By the act of March 28, 1879, the effort was made to accomplish a refunding upon the basis of fifty per cent. of accrued interest and one hundred per cent. of principal (of Virginia's estimated share) in new bonds payable in forty years (and redeemable after ten years) with interest at three per cent. for ten years, four per cent. for twenty years, and five per cent. for ten years. Under this statute, the two-thirds' basis was maintained and those making the exchange, in cases where certificates for the remaining one-third had not already been issued, were to receive certificates like those authorized by the Act of 1871.

While there was a refunding to some extent upon this basis, the legislation of 1879 very largely failed to accomplish its purpose, and another attempt was made under the Act of February 14, 1882. By this, the outstanding bonds were divided into classes. For those which had been issued under the Act of 1871, new bonds were authorized on the basis of fifty-three per cent. of principal and one hundred per cent. of accrued interest. The act recited that the net revenues of

*239 the State did not warrant * the assumption of a larger rate of interest than three per cent, upon the full amount of Virginia's equitable share of the old debt as the same was ascertained and formally declared by an account set forth in the preamble,—an account stated on the two-thirds' basis. The new bonds were for fifty years (redeemable after July 1, 1900) with interest at three per cent. until paid.

As shown by the account contained in this act, the payments in money from January 1, 1861, to July 1, 1871, for interest, amounted to $7,256,723.66.[1] In this account, the entire amount thus paid was credited against the two-thirds of the accrued interest (or interest on two-thirds of the principal) which Virginia had estimated to be her equitable share. The interest on this share exceeded these payments. It also appeared that between 1863 and 1871 bonds had to be redeemed to the amount of $3,710,449.67 and this amount was credited against Virginia's two-thirds of principal. The statement of account was made for the purpose of explaining and justifying the attempted readjustment.

The plan of 1882 proved abortive. New bonds to a considerable amount were issued under its provisions, but the bondholders for the most part refused to accede to its terms and apparently there were outstanding on February 20, 1892 (unfunded under the Act of 1882) about $28,000,000 of principal and interest (to July 1, 1891), that is, as representing Virginia's assumed proportion. On that date an act was passed by the General Assembly which provided for the refunding of these bonds on the basis of nineteen-twenty-eighths of the principal and accrued interest (as of July 1, 1891) in new bonds bearing two per cent. interest for ten years and three per cent. until paid. The bonds were to be for one hundred years, and were redeemable after July 1, 1906. The *240 refunding was carefully limited * to the two-thirds' basis and certificates were to be issued for the remaining one-third similar to those above described. In 1894 provision was made for further time for an exchange on the stated basis, which however was not to be extended beyond the end of the year. There were additional bonds, said to amount to over $2,400,000, held by educational corporations, which were refunded under a statute passed February 23, 1892, in new obligations for their full amount of principal and interest.

Under this legislation the refunding was accomplished. Virginia alleges in her bill that "at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892."

In the light of this financial history, we come to the consideration of Virginia's payments. It is stated on behalf of Virginia that the amount of interest paid by her from January 1, 1861, to September 30, 1913 (the latest date to which the calculation has been made), amounted to $41,071,219.02. Taking Virginia's share of principal at the amount assumed by her, as computed in our former decision (220 U. S., p. 35), that is, $22,598,049.21 (an amount somewhat less than her true proportion of the total debt of January 1, 1861), the total interest paid as above stated, would be the equivalent of simple interest upon that principal at a rate somewhat less than three and one-half per cent.

But these payments on account of interest did not include bonds that had

[1] Of this total, the sum of $3,662,434.55 is stated as having been paid from January 1, 1861, to July 1, 1863, and the amount paid from July 1, 1863, to July 1, 1871, is given as $3,594,289.11.

been retired, and Virginia's exhibit shows that in addition to these payments she had 'paid off and retired' (down to September 30, 1913) bonds amounting to $12,141,591.49; and that, further, her new bonds issued for the portion of the old debt, funded and assumed by her, and outstanding on September 30, 1913, amounted to $24,645,075.23. These items including the item of interest first
*241 mentioned make a total of * $77,857,885.74. We have in this aggregate the amounts paid by Virginia on account of the old debt to the date mentioned. If from this total we deduct the amount of Virginia's assumed share of principal, as above computed ($22,598,049.21), the remainder would be $55,259,836.53; or, if all payments of interest were put on a gold basis, $53,002,130.40. If we treat this entire sum as applicable to interest—and to interest upon Virginia's assumed share alone—it would be the equivalent of simple interest upon the principal stated, from January 1, 1861, to September 30, 1913, at a rate a little less than four and one-half per cent.

It is manifestly impracticable, and it would not be equitable, to apply rates of interest in the present determination which would follow the details of Virginia's financial arrangements. The amounts included in the total of Virginia's payments represent large sums paid as interest upon interest. West Virginia's equitable proportion should not be increased by a rate based upon successive allowances of compound interest.

But in the light of the facts that have been recited a fair basis of adjustment may be fixed.

It will be observed that the amount of the new bonds shown by Virginia's statement to be outstanding on September 30, 1913, was slightly in excess of her assumed share of principal as computed. That is, Virginia through the successful operation of the Act of 1892 (which provided for a refunding as of July 1, 1891), taken with what had been effected under the Act of 1892, placed an amount substantially equal to her assumed share of principal upon a permanent basis of three per cent. There appears to be an exception to this in the case of certain securities, but their amount is relatively small. Virginia's creditors may have been induced to accept this adjustment, and the low rate it involved, by reason of the inclusion of unpaid interest in fixing the principal of the new bonds.
*242 But, on the other hand, the total of the principal and interest * then outstanding was largely reduced in the refunding, and the rate of interest upon the new bonds under the Act of 1892 for the first ten years was made two per cent. The reduction, and the ten years' rate, may well be regarded as offsetting the advantage derived from including in the face of the new obligations whatever excess there may have been over the assumed share of Virginia as computed.

Taking all the facts into consideration, we reach the conclusion that in fixing the equitable proportion of West Virginia, her part of the principal should be put on a three per cent. basis, as of July 1, 1891; that is, that interest should run at that rate from that time. For the preceding period, from January 1, 1861, to July 1, 1891, there is greater difficulty. In recognition of the amounts paid by Virginia upon her share, but also having in mind the payments of compound interest attributable to her own exigency, the nearest approach to complete justice will be had by allowing interest at four per cent.

This, we are satisfied, will adequately recognize and enforce the equities of both States.

Upon this basis, West Virginia's share of the debt will be:

Principal, after allowing credits as stated,		$ 4,215,622.28
Interest, January 1, 1861, to July 1, 1891, at four per cent.	$5,143,059.18	
July 1, 1891, to July 1, 1915, at three per cent.	3,035,248.04	8,178,307.22
		$12,393,929.50

For convenience the calculation of interest has been made to July 1, 1915. In the decree the calculation will be at three per cent. per annum from July 1, 1891, to the date of entry. The decree will also provide for interest at the rate of five per cent, per annum upon the amount awarded, until paid.

Costs to be equally divided between the States.[1]

State of North Carolina v. State of Tennessee.

Supreme Court of the United States, 1916.

[240 *United States,* 652.]

Decree embodying report of Commissioners and establishing Slick Rock Basin and Tellico Basin sections of the boundary between the States of North Carolina and Tennessee established in accordance with decision of this court, 235 U. S. 1.

THIS cause coming on to be heard on the motion of counsel for the complainant, concurred in by the counsel for the defendant, to confirm the report of the Commissioners heretofore appointed by this court to ascertain, retrace, re-mark, and re-establish the real, certain, and true boundary line between the States of North Carolina and Tennessee between certain points, mentioned in said report, which said report is in the words and figures following to wit:

"Pursuant to a decree of the Supreme Court of the United States, issued at the October Term, 1914, which appointed D. B. Burns of Asheville, N. C., W. D. Hale, of Maryville, Tenn., and Addison, Ky., and Joseph Hyde Pratt of Chapel Hill, N. C., Commissioners to permanently mark and set monuments on the line in dispute in said controversy between said States, and which set out in detail the duties of said Commissioners, we, the said D. B. Burns, W. D. Hale and Joseph Hyde Pratt, Commissioners, do herewith respectfully submit our report.

"We have, as ordered, reproduced on the accompanying map, No. 1, the State Line from Tree No. 1—the same being the 59th mile-tree marked by the Commissioners in 1821—southwestwardly to the point where the dispute began, which point is 15 feet south 32 46′ west from Tree No. 29—the hemlock fore and aft tree marked by the Commissioners in 1821—just north of Little Tennessee River. The description of said reproduced line is as follows, viz.:

[1] For the succeeding phase of this case see *Virginia* v. *West Virginia* (241 U. S. 531), *post,* p. 1740.—Editor.

*653 * "Beginning at the 59th mile tree, a large red oak, or mountain oak, marked on the southeast side $\frac{59}{M}$. This tree stands in the Rich Gap of the Smoky Mountain, and 260 feet North 30 47′ East from the lowest part of said gap, and runs with the meanders of the mountain South 25 50′ 00″ West 190 feet to a stake,
thence South 43 55′ 35″ West 472 feet to a stake,
thence South 60 58′ 55″ West 212 feet to a stake,
thence South 83 18′ 42″ West 344 feet to a stake,
thence South 82 32′ 00″ West 235 feet to a stake,
thence South 55 05′ 47″ West 561 feet to a stake,
thence South 32 31′ 35″ West 545 feet to a stake,
thence South 51 24′ 25″ West 424 feet to a stake,
thence South 43 58′ 57″ West 284 feet to a stake,
thence South 40 20′ 30″ West 520 feet to a stake,
thence South 45 52′ 47″ West 332 feet to a stake,
thence South 0 30′ 10″ East 410 feet to a stake,
thence South 6 58′ 06″ East 191 feet to a stake,
thence South 2 26′ 42″ West, passing the Dalton Gap at 567 feet—a very deep gap through which the Old Tellassee Trail passes, 1367.6 feet to a stake,
thence South 65 58′ 00″ West 149 feet to a stake,
thence South 47 06′ 05″ West 516 feet to a stake,
thence South 62 08′ 15″ West 264 feet to a stake,
thence South 74 42′ 15″ West 155 feet to a stake,
thence South 53 02′ 15″ West 579 feet to a stake,
thence South 25 22′ 15″ West 134 feet to a stake,
thence South 15 59′ 15″ West 637 feet to a stake,
thence South 28 52′ 30″ West 783 feet to a stake,
thence South 33 43′ 51″ West 517 feet to a stake,
thence South 0 31′ 51″ East 279.5 feet to a stake,
then South 5 31′ 57″ West, passing a pile of rocks at the supposed location of the 61st mile tree at 423 feet, 463 feet to a stake,
thence South 2 40′ 30″ East 450 feet to a stake,
thence South 17 21′ 33″ West 451 feet to a stake,
*654 * thence South 41 01′ 06″ West 93 feet to a stake,
thence South 43 45′ 39″ West 511 feet to a stake,
thence South 17 49′ 27″ West 437 feet to a stake,
thence South 34 00′ 00″ West 246 feet to a stake,
the turnpike road in a deep gap,
thence South 73 30′ 00″ West 380.2 feet to a stake,
thence South 60 43′ 30″ West 125.4 feet to a stake,
thence South 52 18′ 00″ West 1304.4 feet to a stake,
thence North 72 19′ 00″ West 490 feet to a stake,
thence South 57 34′ 00″ West 450 feet to a stake,
thence North 63 18′ 30″ West 365 feet to a stake,
thence North 72 23′ 00″ West, passing the Locust Gap, where the 62d mile tree is said to have stood, at 112 feet, 745 feet to a stake,
thence South 83 42′ 00″ West 539.7 feet to a stake,

thence South 34 25′ 30″ West 198.7 feet to a stake,
thence South 82 52′ 30″ West 531.6 feet to a stake,
thence South 54 14′ 00″ West 370 feet to a stake,
thence North 75 17′ 30″ West 550 feet to a stake,
thence South 76 15′ 30″ West 550 feet to a stake.
thence South 69 28′ 30″ West 200 feet to a stake,
thence South 85 32′ 00″ West 400 feet to a stake,
thence South 71 35′ 00″ West 670 feet to a stake,
thence South 66 21′ 00″ West, passing an 18″ hickory, supposed to be the 63d mile tree, at 344 feet, 500 feet to a stake,
thence South 10 59′ 00″ West 200 feet to a stake,
thence South 63 07′ 00″ West 150 feet to a stake,
thence South 27 44′ 00″ West 450 feet to the top of a high knob,
thence South 51 52′ 00″ West 580 feet to a stake,
thence South 56 03′ 00″ West 260 feet to a stake,
thence South 45 13′ 30″ West 390 feet to a stake,
thence South 65 48′ 30″ West 150 feet to a stake,
thence South 26 22′ 00″ West 220 feet to a stake,
thence South 16 12′ 00″ East 260 feet to a stake,
*655 * thence South 52 44′ 30″ West 390 feet to a stake,
thence South 17 48′ 30″ East 590 feet to the top of Lone Pine Knob,
thence North 73 47′ 30″ West 380 feet to a stake,
thence South 76 27′ 30″ West 610 feet to a stake,
thence South 66 20′ 30″ West 450 feet to a stake,
thence South 15 07′ 30″ West 350 feet to a stake,
thence South 59 33′ 30″ West 680 feet to a stake,
thence North 67 51′ 30″ West 470 feet to a stake,
thence South 49 24′ 30″ West, passing a fore and aft hemlock north of Little Tennessee River at 775 feet, 790 feet to where the lines of contention diverge, where we set up a rock 8 inches thick, 12 inches wide, and 18 inches high, and cut on the southeast side of it N. C., on the northwest side TENN., on the northeast side 0+00, and on the southwest side 1915, and cut a X in the top of the rock. This is Monument No. 1. From this point, on the 7th day of August, 1915, we began the survey and marking of the line, marking side line trees with 3 hacks, and fore and aft trees with 2 hacks above a blaze, as follows:

"South 79 11′ 00″ West 135 feet to the river bank, thence down the river on the north bank North 38 27′ 30″ West 285 feet to a stake,
thence North 26 43′ 00″ West 295 feet to a stake,
thence North 22 18′ 30″ West 385 feet to a stake,
thence North 56 42′ 00″ West, passing the stump of tree No. 30 at 259 feet, 619 feet to a stake,
thence North 78 55′ 30″ West 361 feet to a stake,
thence North 78 50′ 00″ West 242 feet to a stake,
thence South 85 11′ 00″ West 372.2 feet to a stake,
thence South 76 29′ 30″ West 276.5 feet to a boulder on the north bank of Little Tennessee River at low water mark, said boulder is 4 feet wide, 10 feet long and 3 feet high, and on it we cut a X, and on the southeast side of the X we cut N. C., 1915, and on the northwest side, TENN., 29 + 70.7. This is Monu-

*656 ment No. 2, thence * South 54 38′ 00″ West 313 feet, crossing the river to a boulder on the south bank of the river and on the west bank of Slick Rock Creek. This boulder is 6 feet wide, 15 feet long and 4 feet high, and on it we cut a X, and on the east side of the X we cut N. C., on the west side TENN., on the north side, 1915, and on the south side 32+83.7. This boulder being 3283.7 feet from Monument No. 1. This is Monument No. 3. From this point we ran up and with the bed of Slick Rock Creek as follows:

South 30′ 13′ 00″ East 209.3 feet to a X on a rock,
thence South 7 24′ 00″ West 494 feet to a X on a rock,
thence South 4 17′ 00″ East 630 feet to a X on a rock,
thence South 33 26′ 00″ West 360.7 feet to a X on a rock,
thence South 60 21′ 00″ West 505.7 feet to a X on a rock,
thence South 02 36′ 30″ East 427.6 feet to a X on a rock,
thence South 21 33′ 30″ East 305.6 feet to a X on a rock, near Ravens Den,
thence North 82 29′ 30″ West 640.4 feet to a X on a rock,
thence South 87 14′ 30″ West 173.5 feet to a X on a rock,
thence South 19 21′ 30″ West 273.3 feet to a X on a rock,
thence South 39 36′ 30″ East 171.0 feet to a X on a rock,
thence South 70 45′ 00″ East 320.3 feet to a X on a rock,
thence South 25 28′ 00″ East 177.9 feet to a X on a rock,
thence South 21 39′ 30″ West 289.0 feet to a X on a rock,
thence North 59 17′ 30″ West 728.4 feet to a X on a rock,
thence South 88 36′ 30″ West 858.0 feet to a X on a rock,
thence North 70 01′ 30″ West 481.6 feet to a X on a rock,
thence South 50 27′ 30″ West 413.0 feet to a X on a rock,
thence South 3 19′ 00″ West 320.0 feet to a X on a rock, at top of lower falls,
thence South 47 27′ 00″ East 464.0 feet to a X on a rock,
thence South 47 15′ 00″ West 113.9 feet to a X on a rock,
thence North 82 52′ 00″ West 531.4 feet to a X on a rock,
thence South 38 42′ 00″ West 172.7 feet to a X on a rock,
thence South 14 09′ 00″ East 534.6 feet to a X on a rock,
thence South 5 09′ 30″ West 798.9 feet to a X on a rock,
*657 *thence South 12 20′ 30″ East 257.7 feet to a X on a rock,
thence South 38 02′ 30″ East 291.8 feet to a X on a rock,
thence South 37 20′ 30″ West 236.0 feet to a X on a rock, near the mouth of Slick Rock Gap branch,
thence North 57 33′ 30″ West 485.5 feet to a X on a rock,
thence North 85 41′ 30″ West 432.3 feet to a X on a rock,
thence South 17 13′ 00″ West 432.3 feet to a X on a rock in Slick Rock Creek, near the west bank, and about 30 feet above where the Belding Trail crosses the creek. This rock is 3 feet wide, 5 feet long and 2 feet high. On it we cut a X and cut N. C. on the southeast side, TENN. on the northwest side, 1915 on the southwest side and 156+69.8 on the northeast side of the cross. This is Monument No. 4.

Thence South 23 40′ 30″ West 189.9 feet to a X on a rock,
thence North 75 04′ 30″ West 279.3 feet to a X on a rock,
thence North 47 01′ 30″ West 870.5 feet to a X on a rock,
thence North 72 23′ 00″ West 320.5 feet to a stake,

thence South 19 47′ 30″ West, passing the mouth of Little Slick Rock Creek at 85 feet, 685.2 feet to a X on a rock,
thence South 41 03′ 00″ West 465.5 feet to a X on a rock,
thence South 24 22′ 00″ West, passing the mouth of Nichols Cove Branch at 140 feet, 622.8 feet to a X on a rock,
thence South 6 35′ 30″ West 275.5 feet to a X on a rock,
thence South 26 39′ 00″ West 518.0 feet to a X on a rock,
thence South 1 58′ 00″ East 507.5 feet to a X on a rock at the Panther Den,
thence South 58 02′ 00″ West 276.7 feet to a X on a rock,
thence South 39 07′ 30″ West 135.6 feet to a X on a rock,
thence South 82 52′ 30″ West 287.2 feet to a X on a rock,
thence North 56 19′ 30″ West 335.0 feet to a X on a rock,
thence North 52 35′ 30″ West 304.0 feet to a X on a rock,
thence South 84 13′ 30″ West 281.8 feet to a X on a rock,
thence South 43 16′ 30″ West 254.8 feet to a X on a rock,
thence South 9 07′ 00″ East 154.4 feet to a X on a rock,
*658 * thence South 36 44′ 00″ East 179.6 feet to a X on a rock,
thence South 14 15′ 00″ West 173.4 feet to a X on a rock,
thence North 86 45′ 30″ West 322.0 feet to a X on a rock,
thence North 71 16′ 00″ West 251.4 feet to a X on a rock,
thence North 17 05′ 30″ West 405.2 feet to a X on a rock,
thence North 68 35′ 00″ West 329.5 feet to a X on a rock,
thence South 43 09′ 00″ West 207.3 feet to a X on a rock,
thence South 23 56′ 30″ West 369.9 feet to a X on a rock,
thence South 44 30′ 30″ West 82.0 feet to a X on a rock,
thence South 4 47′ 00″ West 425.1 feet to a X on a rock,
thence South 8 51′ 00″ East 129.6 feet to a X on a rock,
thence South 53 26′ 00″ West 599.4 feet to a X on a rock,
thence South 2 30′ 00″ East 254.6 feet to a X on a rock,
thence South 16 07′ 30″ East 168.6 feet to a X on a rock,
thence South 35 12′ 00″ West 370.0 feet to a X on a rock,
thence North 67 59′ 30″ West 393.4 feet to a X on a rock at the mouth of a small branch,
thence South 14 36′ 30″ West 494.0 feet to a X on a rock,
thence South 70 54′ 00″ West 160.5 feet to a X on a rock,
thence North 66 12′ 00″ West 561.2 feet to a X on a rock,
thence South 68 50′ 00″ West 197.3 feet to a X on a rock,
thence South 18 18′ 30″ West 350.1 feet to a X on a rock,
thence South 45 16′ 30″ East 241.9 feet to a X on a rock,
thence South 50 11′ 30″ East 281.8 feet to a X on a rock,
thence South 43 40′ 30″ West 316.2 feet to a X on a rock,
thence South 11 19′ 30″ West 238.6 feet to a stake,
thence North 83 33′ 30″ East 314.4 feet to a X on a rock,
thence South 0 44′ 00″ East 193.8 feet to a X on a rock at the mouth of a small branch,
thence South 34 02′ 30″ West 240.0 feet to a X on a rock,
thence South 11 40′ 00″ East 206.7 feet to a X on a rock,
thence South 40 51′ 00″ West 539.3 feet to a X on a rock,

thence South 10 18′ 30″ East, passing the foot of falls at 198 feet, 247.6 feet to a X on a rock,

thence South 73 41′ 00″ East 134.2 feet to a X on a rock in the falls,

*659 * thence South 12 37′ 00″ West 262.6 feet to a rock in the falls,

thence South 11 28′ 30″ East, passing the top of falls at 20 feet, 224.2 feet to a X on a rock,

thence South 23 21′ 30″ West 578.6 feet to a X on a rock,

thence South 48 36′ 30″ West 428.6 feet to a X on a rock,

thence South 10 43′ 30″ East 217.3 feet to a large boulder on the west bank of Slick Rock Creek, near the mouth of Big Stack Gap Branch, and at the point of a ridge leading to the Big Fodderstack Mountain, and near Tree No. 46. This boulder is 6 feet wide, 10 feet long and 5 feet high. On it we cut a X, and on the southeast side of the X we cut N. C., on the northwest side TENN., on the southwest side 1915, and on the northeast side 335+24.9, it being 33,524.9 feet from Monument No. 1. This is Monument No. 5.

Thence up said ridge leading to the Big Fodderstack Mountain South 2 45′ 00″ West 148.6 feet to a stake,

thence South 26 58′ 30″ West 751.1 feet to a stake,

thence North 72 59′ 00″ West 468.9 feet to a stake,

thence South 72 41′ 00″ West 532.8 feet to a stake,

thence South 35 01′ 30″ West 156.7 feet to a stake,

thence South 13 04′ 00″ West 487.0 feet to a stake,

thence South 52 34′ 00″ West 866.6 feet to a stake,

thence South 14 01′ 00″ West 51.4 feet to a stake,

thence South 45 19′ 00″ West 127.7 feet to a stake,

thence South 62 42′ 30″ West 526.8 feet to a stake,

thence South 30 39′ 00″ West 181.8 feet to a stake,

thence South 29 50′ 30″ West 337.4 feet to a stake,

thence South 62 54′ 30″ West 358.3 feet to a stake,

thence South 9 05′ 30″ West 177.0 feet to a stake,

thence South 37 07′ 30″ West 164.0 feet to a stake,

thence South 26 04′ 30″ West 302.7 feet to a stake,

thence South 29 15′ 00″ West 335.0 feet to a stake,

thence South 42 23′ 00″ West 104.0 feet to a stake,

thence South 58 23′ 00″ West 814.0 feet to a stake,

*660 * thence South 78 59′ 00″ West 510.6 feet to a stake,

thence North 73 26′ 00″ West 559.6 feet to a stake,

thence North 53 08′ 00″ West 261.1 feet to a stake,

thence South 86 21′ 00″ West 279.8 feet to a stake,

thence South 75 19′ 00″ West 147.0 feet to a stake,

thence North 86 57′ 00″ West 207.4 feet to a stake,

thence South 60 01′ 00″ West 342.8 feet to the top of the Big Fodderstack Mountain, where we set Monument No. 6, a stone 5 inches thick, 14 inches wide and 18 inches high, and on it we cut on the southeast side N. C., 427+25.0, D. B. B., W. D. H., J. H. P., on the northwest side TENN., 1915, and a X in the top. This stone stands 42,725 feet from Monument No. 1. Thence along Big Fodderstack Mountain with its meanders and with the lines of D. B. Burn's former survey South 14 29′ 30″ East 138.1 feet to a stake,

thence South 8 53′ 30″ East 541.4 feet to a stake,
thence South 28 15′ 30″ East, passing Harrison Gap at 1196 feet, 1323.2 feet to a stake,
thence South 11 12′ 30″ West 810.8 feet to a stake,
thence South 34 50′ 00″ East 510.7 feet to a stake,
thence South 29 38′ 00″ East 167.8 feet to a stake,
thence South 23 20′ 00″ East 1063.0 feet to a stake,
thence South 41 18′ 30″ East 311. 1 feet to a stake on the Rock Stack,
thence South 60 38′ 30″ East 354.6 feet to a stake,
thence South 83 22′ 00″ East 453.3 feet to a stake,
thence South 60 02′ 20″ East 489.4 feet to a stake,
thence South 37 57′ 30″ East 206.9 feet to a stake, on the top of a very high knob,
thence South 10 09′ 30″ East 574.5 feet to a stake,
thence South 9 05′ 30″ East 586.2 feet to a stake,
thence South 21 34′ 00″ East 195.3 feet to a stake,
thence South 2 41′ 00″ East 444.7 feet to Monument No. 7—a stone 5 inches thick, 10 inches wide and 18 inches high. We cut a X in the top of it. On
*661 the east side we * inscribed N. C., 1915, and on the west side TENN., 508 + 96. This stone stands in the Glen Gap, and is 50,896 feet from Monument No. 1; continuing on same course 228.9 feet to a stake,
thence South 47 50′ 30″ East 334.7 feet to a stake,
thence North 82 05′ 30″ East 150.7 feet to a stake,
thence North 80 40′ 30″ East 252.8 feet to a stake,
thence South 67 14′ 30″ East 651.0 feet to a stake,
thence South 40 33′ 00″ East 133.9 feet to a stake on the Chestnut Knob,
thence South 5 27′ 00″ East 301.1 feet to a stake,
thence South 20 29′ 00″ West 433.5 feet to a stake,
thence South 33 45′ 30″ West 352.4 feet to a stake,
thence South 33 52′ 00″ West 450.5 feet to a stake,
thence South 26 05′ 00″ West 205.2 feet to a stake,
thence South 6 21′ 30″ West 60.7 feet to a stake,
thence South 17 37′ 30″ West 515.8 feet to a stake,
thence South 13 56′ 00″ West 139.0 feet to a stake,
thence South 21 45′ 00″ East 325.2 feet to a stake,
thence South 42 15′ 00″ East 324.9 feet to a stake,
thence South 40 47′ 30″ East 327.4 feet to a stake in the Denton Gap,
thence South 7 15′ 30″ East 335.1 feet to a stake,
thence South 22 31′ 30″ West 176.7 feet to a stake,
thence South 14 59′ 30″ East 563.9 feet to a stake,
thence South 14 33′ 00″ East 355.5 feet to a stake in the Cherry Log Gap,
thence South 4 38′ 00″ East 487.5 feet to a stake,
thence South 0 16′ 00″ East 71.3 feet to a stake,
thence South 4 01′ 30″ East 89.4 feet to a stake,
thence South 16 01′ 00″ West 210.3 feet to a stake,
thence South 0 30′ 00″ West 326.6 feet to a stake,
thence South 5 30′ 30″ West 819.4 feet to a stake,
thence South 40 32′ 00″ East 262.5 feet to a stake,
thence South 41 19′ 00″ East 343.9 feet to a stake,

*662 thence South 29 48′ 00″ West 14.9 feet to a large boulder * on the Stratton Bald Mountain, at its junction with Big Fodderstack Mountain, and at the point where the two lines of contention join. This boulder is Monument No. 8, and is 3 feet wide at its base, 10 feet long and 3 feet high. On the top of this boulder we cut a X, on the southeast side N. C., 601 + 40.7, and on the northwest side TENN., 1915. This boulder stands 60,140.7 feet from Monument 1. Thence along the top of the main ridge that divides the waters of Citico Creek, North Fork of Tellico River and Sycamore Creek from the waters of Santeelah and Snowbird creeks, as follows:

thence South 73 34′ 00″ West 194.0 feet to a stake,
thence South 50 34′ 30″ West 393.6 feet to a stake,
thence South 52 49′ 30″ West 84.0 feet to a stake,
thence South 50 55′ 30″ West 178.0 feet to a stake,
thence South 31 43′ 30″ West 301.0 feet to a stake,
thence South 32 02′ 30″ West 1575.8 feet to a stake,
thence South 48 45′ 30″ West 631.2 feet to a stake,
thence South 24 54′ 30″ West 113.5 feet to a stake,
thence South 25 23′ 30″ West 581.5 feet to a stake,
thence South 34 27′ 30″ West 502.0 feet to a stake,
thence South 31 55′ 30″ West 143.2 feet to a stake,
thence South 35 18′ 00″ West 364.8 feet to a stake,
thence South 35 39′ 00″ West 623.6 feet to a stake,
thence South 8 58′ 30″ West 480.4 feet to a stake,
thence South 40 20′ 00″ West 523.0 feet to a stake,
thence South 59 35′ 00″ West 768.0 feet to a stake,
thence South 12 45′ 00″ West, crossing the Tellico Trail at 297 feet, on top of the Strawberry Knob, 639.3 feet to a stake,
thence South 71 42′ 30″ West 591.7 feet to a stake,
thence South 86 36′ 30″ West 209.3 feet to a stake,
thence South 68 49′ 30″ West 477.7 feet to a stake,
thence North 71 42′ 00″ West 332.5 feet to a stake,
thence South 79 01′ 00″ West 362.8 feet to a stake,
thence South 70 57′ 00″ West 412.4 feet to a stake,
*663 * thence South 73 39′ 00″ West 383.9 feet to a stake at Rock Stop Bear stand,
thence South 28 26′ 00″ West 389.1 feet to a stake,
thence South 45 42′ 00″ West 281.3 feet to a stake,
thence South 72 20′ 30″ West 490.3 feet to a stake,
thence South 73 31′ 30″ West 352.7 feet to a stake,
thence South 72 44′ 30″ West 227.3 feet to a stake,
thence South 25 09′ 00″ West 208.0 feet to a stake,
thence South 26 31 00″ West 598.7 feet to a stake in Beech Gap,
thence South 11 01′ 00″ West 269.0 feet to a stake,
thence South 50 51′ 30″ East 403.0 feet to a stake,
thence South 35 55′ 30″ East 161.0 feet to a stake,
thence South 36 36′ 30″ East 369.0 feet to a stake,
thence South 32 28′ 30″ East 1272.4 feet to a stake,
thence South 36 24′ 00″ West 142.9 feet to a stake,

thence South 37 42′ 30″ West 391.9 feet to a stake,
thence South 47 53′ 00″ West 292.8 feet to a stake,
thence South 12 09′ 30″ West 668.7 feet to a stake,
thence South 0 58′ 00″ West 631.3 feet to a stake,
thence South 76 29′ 00″ East 586.4 feet to a stake,
thence North 75 12′ 00″ East 187.6 feet to a stake,
thence South 81 49′ 00″ East, 431.4 feet to a stake,
thence South 66 09′ 30″ East, passing Stratton's Grave on the crest of the mountain at 148 feet, 245.4 feet to a stake,
thence South 25 50′ 30″ East, passing the John Meadows Gap at 168 feet, 688.4 feet to a stake,
thence South 19 13′ 00″ East 283.7 feet to a stake,
thence South 22 35′ 30″ East 490.5 feet to a stake,
thence South 25 04′ 30″ East 144.0 feet to a stake,
thence South 18 23′ 30″ West 785.0 feet to a stake on the top of John Knob,
thence South 39 58′ 00″ West 148.4 feet to a stake,
thence South 38 22′ 00″ West 147.6 feet to a stake,
thence South 48 28′ 00″ West 434.0 feet to a stake,
*604 * thence South 15 49′ 00″ West 746.6 feet to a stake,
thence South 5 26′ 00″ West 341.0 feet to a stake,
thence South 2 47′ 00″ East 583.4 feet to a stake,
thence South 17 49′ 00″ West 371.0 feet to a stake,
thence South 20 38′ 00″ West 290.0 feet to a stake,
thence South 19 42′ 30″ West 384.6 feet to a stake,
thence South 20 37′ 30″ West 317.9 feet to a stake,
thence South 12 47′ 00″ East 312.9 feet to a stake,
thence South 25 10′ 00″ West 515.6 feet to a stake,
thence South 17 50′ 00″ West 248.3 feet to a stake,
thence South 22 53′ 00″ West 284.5 feet to a stake,
thence South 18 25′ 00″ West 514.2 feet to a stake,
thence South 1 00′ 00″ East 673.6 feet to the top of Little Haw Knob,
thence South 11 31′ 30″ West 370.2 feet to a stake,
thence South 15 43′ 30″ East 502.2 feet to a stake,
thence South 30 35′ 30″ East passing McClelland's mile stone marked N. C. 78 at 303 feet, 346.8 feet to a stake,
thence South 54 38′ 30″ East 243.6 feet to a stake,
thence South 67 13′ 30″ East 344.6 feet to a stake,
thence South 79 08′ 30″ East 593.5 feet to a stake,
thence South 83 36′ 00″ East 355.5 feet to a stake,
thence South 86 36′ 30″ East 392.5 feet to a stake,
thence South 62 04′ 30″ East 735.5 feet to a stake, on the top of Haw Knob,
thence South 6 04′ 30″ East 362.7 feet to a stake,
thence South 1 04′ 30″ East 193.1 feet to a stake,
thence South 4 36′ 30″ West 321.7 feet to a stake,
thence South 9 11′ 30 East 325.5 feet to a stake,
thence South 32 29′ 30″ East 121.0 feet to a stake,
thence South 49 34′ 00″ East 478.3 feet to a stake,
thence South 37 48′ 00″ East 343.1 feet to a stake,

thence South 24 19′ 00″ East 713.6 feet to a stake,
thence South 66 03′ 30″ East 205.3 feet to a stake,
thence South 57 47′ 30″ East 283.7 feet to a stake,
thence South 71 16′ 00″ East 223.8 feet to a stake,
*665 * thence South 5 23′ 00″ West 111.2 feet to a stake,
thence South 30 09′ 00″ West 395.0 feet to a stake,
thence South 40 45′ 00″ West 607.0 feet to a stake,
thence South 21 14′ 00″ West 225.0 feet to a stake,
thence South 6 33′ 00″ West 170.0 feet to a stake, at northwest end of Laurel Top.
thence South 21 25′ 30″ East 465.4 feet to a stake, at southeast end of Laurel Top.
thence South 36 34′ 00″ West 296.4 feet to a stake,
thence South 45 12′ 30″ West 1101.9 feet to a stake,
thence South 44 59′ 30″ West 178.3 feet to a stake,
thence South 65 52′ 30″ West 140.5 feet to a stake, on the top of Lebo Knob,
thence South 46 01′ 30″ West 106.8 feet to a stake,
thence South 60 33′ 00″ West 450.3 feet to a Rock Ledge projecting out of the ground 2 feet high, 5 feet long and 1 foot thick and marked

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C. Co. I G. Co.
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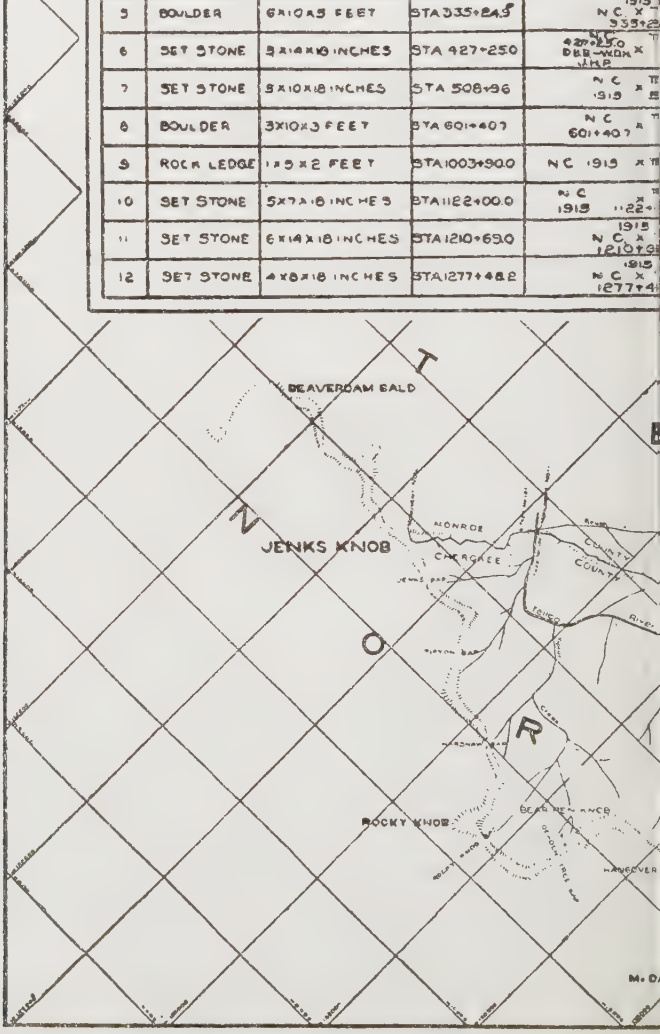
This is the place known as the County Corners and we used this Rock for Monument No. 9, and on the top of it we cut a X, on the southeast face N. C., 1915, and on the northwest face TENN. 1003+90.0. This stone is 100,390, feet from Monument No. 1 and is the point at which the lines of contention diverge; thence down the State Ridge as it meanders South 51 21′ 00″ West passing the Hog Jaw Gap at 535 feet, 831.1 feet to a stake,
thence South 55 29′ 30″ West 311.4 feet to a stake,
thence South 42 13′ 00″ West 244.0 feet to a stake,
thence South 72 04′ 00″ West 337.5 feet to a stake,
thence North 81 54′ 00″ West 47.7 feet to a stake, top of Grassy Top,
thence South 60 51′ 00″ West 71.7 feet to the junction of the State Ridge and Rough Ridge, known as Little Junction, thence South 66 21′ 00″ 137.0 feet to a stake,
*666 * thence South 24 14′ 30″ West 271.1 feet to a stake,
thence South 21 30′ 00″ West 351.4 feet to a stake,
thence South 30 51′ 30″ West 412.4 feet to a stake,
thence South 23 40′ 00″ West 236.2 feet to a stake,
thence South 34 11′ 30″ West 676.9 feet to a stake,
thence South 14 08′ 00″ West 1426.2 feet to a stake,
thence South 40 10′ 30″ West 528.9 feet to a stake,
thence South 51 27′ 30″ West 602.6 feet to a stake,
thence South 28 34′ 30″ West 202.6 feet to a stake,
thence South 56 01′ 00″ West 498.7 feet to a stake,
thence South 45 39′ 00″ West 642.2 feet to a stake,
thence South 15 10′ 00″ West 370.1 feet to a stake,
thence South 63 56′ 30″ West 260.3 feet to a stake,

thence North 89 04′ 30″ West 257.1 feet to a stake,
thence South 58 56′ 30″ West 241.5 feet to a stake,
thence South 83 58′ 30″ West 431.8 feet to a stake,
thence South 38 50′ 30″ West 700.1 feet to a stake,
thence South 32 17′ 00″ West 331.7 feet to a stake,
thence South 10 32′ 00″ East 399.1 feet to a stake,
thence South 37 30′ 00″ West 179.5 feet to a stake,
thence South 58 29′ 00″ West 358.5 feet to Red Log Gap, where we set a Stone 5 inches thick, 7 inches wide and 18 inches high, and on top of it we cut a X, on the southeast side N. C., 1915, on the northwest side TENN., and on the northeast side 1122+00. This Stone stands 112,200 feet from Monument No. 1 and is Monument No. 10.
Thence South 57 29′ 00″ West 140.6 feet to a stake,
thence South 46 20′ 00″ West 453.6 feet to a stake,
thence South 83 13′ 00″ West 542.9 feet to a stake,
thence South 52 58′ 30″ West 561.6 feet to a stake,
thence North 81 00′ 30″ West 394.8 feet to a stake,
thence South 70 42′ 00″ West 547.2 feet to a stake,
thence South 83 55′ 30″ West 414.5 feet to a stake,
thence South 70 39′ 00″ West 406.1 feet to McClelland's mile rock, a large boulder over one end of which a tree has grown; said rock is marked N. C.;
*667 thence South 57 47′ 00″ West 498.5 feet to a stake,
thence South 61 51′ 30″ West 334.7 feet to a stake,
thence South 59 58′ 00″ West 361.9 feet to a stake,
thence South 77 15′ 30″ West 243.5 feet to a stake,
thence South 65 56′ 00″ West 384.4 feet to a stake,
thence South 88 22′ 00″ West 132.0 feet to a stake,
thence South 56 16′ 00″ West 241.6 feet to a stake,
thence North 63 43′ 30″ West 133.6 feet to a stake,
thence South 56 05′ 00″ West 474.4 feet to a stake,
thence North 81 30′ 30″ West 303.0 feet to a stake,
thence South 79 04′ 30″ West 501.0 feet to a stake,
thence South 57 56′ 00″ West 615.6 feet to a stake,
thence South 79 41′ 30″ West 411.1 feet to a stake,
thence South 69 40′ 00″ West 153.7 feet to a stake,
thence South 51 32′ 30″ West 378.4 feet to a stake,
thence South 72 12′ 00″ West 332.4 feet to Monument No. 11—a Stone 6 inches thick, 14 inches wide and 18 inches high. On the top of it we cut a X; on the southeast side N. C.; on the southwest side 1915; on the northwest side TENN.; on the northeast side 1210+69.0.

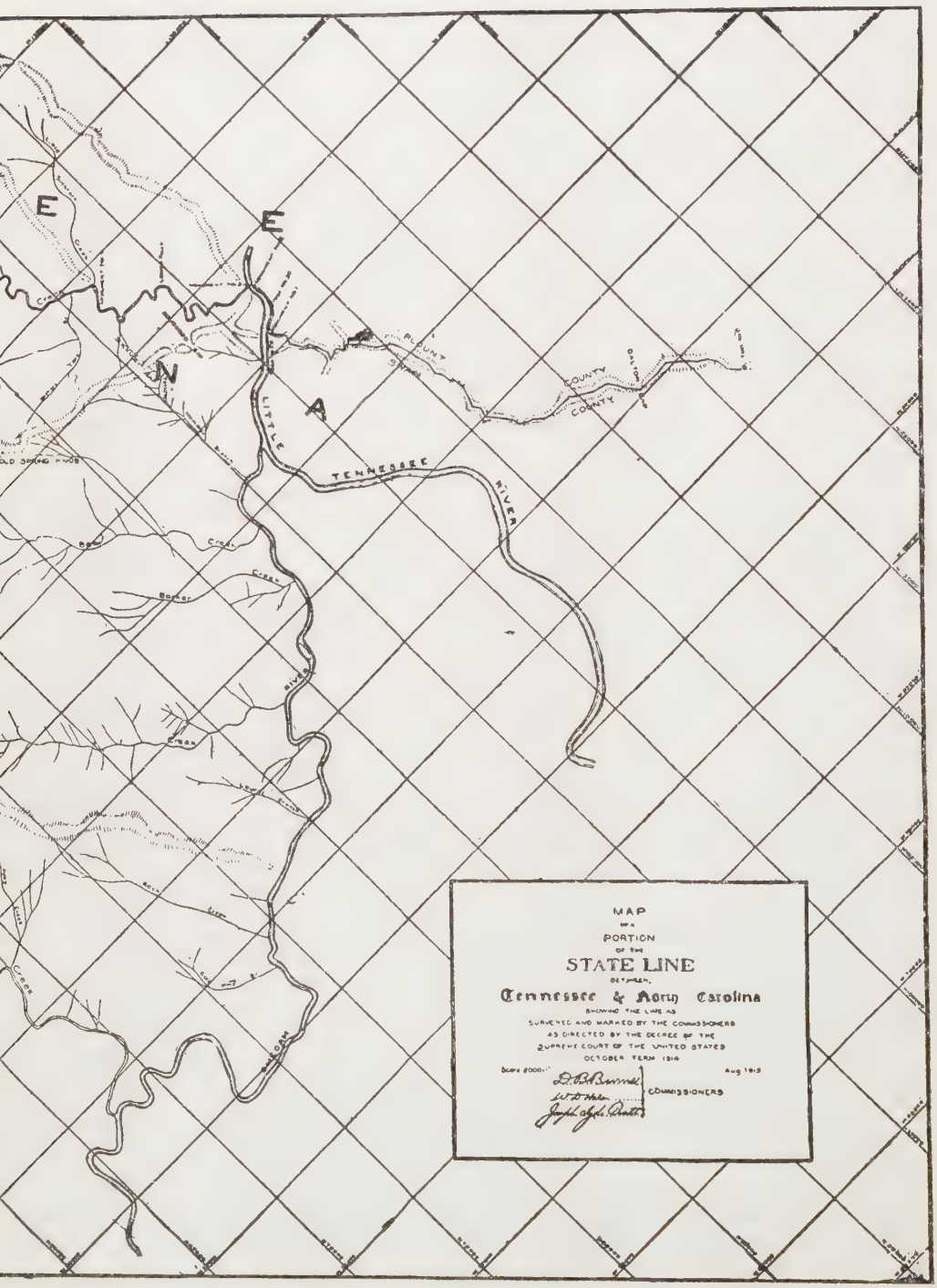
This Stone stands 121,069 feet from Monument No. 1 and 61 feet from the northeast bank of Tellico River, thence crossing Tellico River South 50 44′ 30″ West 138.0 feet to a stake,
thence South 36 48′ 30″ West 107.7 feet to a stake,
thence South 43 47′ 30″ West 81.9 feet to a stake,
thence South 30 17′ 30″ West 120.1 feet to a stake,
thence South 35 52′ 30″ West 202.1 feet to a stake,

SCHEDULE OF PERMANENT MONUMEN

NO.	KIND	APPROXIMATE SIZE	LOCATION	INSCRIPT
1	SET STONE	8X12X18 INCHES	STA 0+00	1915 N C X 0+0C
2	BOULDER.	4X10X3 FEET	STA 28+70.7	N C 1915 X
3	BOULDER	6X15X4 FEET	STA 32+80.7	1915 N C X 32+8
4	BOULDER	3X5X2 FEET	STA 156+ .8	1915 N C X 156+C
5	BOULDER	6X10X5 FEET	STA 335+24.5	1915 N C X 335+2
6	SET STONE	8X14X10 INCHES	STA 427+25.0	N C DEE-NOM X
7	SET STONE	8X10X8 INCHES	STA 508+96	N C 1915
8	BOULDER	3X10X3 FEET	STA 601+40.7	N C 601+40.7
9	ROCK LEDGE	15X2 FEET	STA 1003+90.0	N C 1915
10	SET STONE	5X7X18 INCHES	STA 1122+00.0	N C 1915
11	SET STONE	6X14X18 INCHES	STA 1210+69.0	1915 N C X 1210+6
12	SET STONE	4X8X18 INCHES	STA 1277+48.2	1915 N C X 1277+4



LITTLE FODDER STACK
WILD CAT KNOB
BIG FODDER STACK
MONROE
GRAHAM
ROCK STACK
JUNCTION
STRATTON BALD
HANGOVER
HADE
JOHN KNOB
LITTLE HAW KNOB
HAW KNOB
GRASSY TOP
LAUREL TOP
COUNTY CORNERS
HUCKLEBERRY KNOB
HOOPER BALD
CHEROKEE
GRAHAM
COUNTY
3+300


E
E
N
A
LITTLE
TENNESSEE
RIVER
BLOUNT
COUNTY
MAP
OF A
PORTION
OF THE
STATE LINE
BETWEEN
Tennessee & North Carolina
SHOWING THE LINE AS
SURVEYED AND MARKED BY THE COMMISSIONERS
AS DIRECTED BY THE DECREE OF THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1910
Aug 1913
COMMISSIONERS

thence South 48 47′ 00″ West passing the 86 mile tree, an 18 inch holly marked 86 M at 95 feet, 131.7 feet to a stake,
thence South 35 26′ 00″ West 396.4 feet to a stake,
thence South 17 33′ 30″ West 147.4 feet to a stake,
thence South 34 03′ 30″ East 439.7 feet to a stake,
thence South 10 32′ 00″ East 242.5 feet to a stake,
thence South 46 26′ 00″ West 415.3 feet to a stake,
thence South 87 32′ 00″ West 286.3 feet to a stake,
*668 thence South 70 18′ 00″ West 354.0 feet to a stake,
thence South 35 37′ 30″ West 431.3 feet to a stake,
thence South 58 28′ 00″ West 472.4 feet to a stake,
thence South 5 00′ 30″ West 293.4 feet to a stake,
thence South 75 17′ 30″ West 584.3 feet to a stake,
thence South 24 37′ 30″ West 357.1 feet to a stake,
thence South 74 21′ 30″ West 309.8 feet to a stake,
thence South 21 48′ 30″ West 445.6 feet to a stake,
thence South 39 11′ 00″ West 460.3 feet to a stake,
thence South 64 2′ 00″ West 261.5 feet to the top of Jenks Knob at the point where the two lines of contention join. Here we set up Monument No. 12—a Stone 4 inches thick, 8 inches wide and 18 inches high, on top of which we cut a X; on the southeast side N. C.; on the southwest side 1915; on the northwest side TENN., and on the northeast side 1277+48.2. This stone stands 127,748.2 feet from Monument No. 1, and at the end of the contention in this cause.

"Signed this the 20th day of October, 1915.

"(Signed) D. B. BURNS,
"(Signed) W. D. HALE.
"(Signed) JOSEPH HYDE PRATT,
"Chairman."

On consideration whereof,

It is now here ordered, adjudged, and decreed by this Court that the real, certain, and true boundary line between the States of North Carolina and between Tennessee said certain points is as delineated in the said report and on the map attached thereto and made a part hereof.

It is further ordered, adjudged, and decreed that each party pay one-half of the costs in this case.

State of Virginia v. State of West Virginia.

Supreme Court of the United States, 1916.

[241 *United States,* 531.]

A State should be given an opportunity to accept and abide by the decision of this court; and, in a case in which the legislature has not met in regular session since the rendition of the decision, motion for execution will be not granted, but denied without prejudice to renew after the next session of the legislature.

THE facts are stated in the opinion.

Mr. John Garland Pollard, Attorney General of the State of Virginia, for complainant.

Mr. A. A. Lilly, Attorney General of the State of West Virginia, with whom *Mr. John H. Holt* was on the brief, for defendant.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In the original cause of *Commonwealth of Virginia* v. *State of West Virginia,* on June 14, 1915, a decree was rendered in favor of Virginia and against West Virginia for the sum of $12,393,929.50 with interest thereon at the
*532 rate * of five percentum from July 1st, 1915, until paid. 238 U. S. 202. Virginia now petitions for a writ of execution against West Virginia on the ground that such relief is necessary as the latter has taken no steps whatever to provide for the payment of the decree. West Virginia resists the granting of the execution on three grounds: (1) "Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her Legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen;" (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if in the exercise of jurisdiction such a judgment was entered.

Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.

The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the legislature

of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment.

And it is so ordered.[1]

State of Arkansas v. State of Tennessee.

Supreme Court of the United States, 1918.

[246 *United States,* 158.]

When two States of the Union are separated by a navigable stream, their boundary being described as "a line drawn along the middle of the river," or as "the middle of the main channel of the river," the boundary must be fixed (by the rule of the "thalweg") at the middle of the main navigable channel, so that each State may enjoy an equal right of navigation. *Iowa* v. *Illinois,* 147 U. S. 1.

Following this principle, the court holds that the true boundary line between the States of Arkansas and Tennessee is the middle of the main channel of navigation of the Mississippi, as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

Certain decisions of the Arkansas and Tennessee courts and acts of the Tennessee legislature, referred to in the opinion, fall short of showing that the States, by practical location and long acquiescence, established the boundary, at the place in dispute, as a line equidistant from the well-defined permanent banks of the river. It is therefore unnecessary to decide whether the supposed agreement between them would be valid without consent of Congress, in view of the third clause of Art. I, § 10, of the Constitution.

Where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the
*159 natural and gradual processes * known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

This rule applies to a navigable stream between States; the boundary is not changed by an avulsion but remains as it was before, the center line of the old main channel of navigation.

The common-law doctrine permitting the private owner of land which has been submerged in the sea to regain it, upon identification after a subsequent reliction, is but an exception to the general rule giving to the sovereign land uncovered by sudden recession of the sea; it has no proper bearing upon the rule stated with reference to boundary streams; and affords no basis for restoring such a boundary, after an avulsion, to its pristine location and thus eliminating the shifting effects of erosions and accretions which occurred before the avulsion took place.

After an avulsion, so long as the old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant the effect of these processes is at an end; the boundary then becomes fixed at the middle of the channel, as above defined, and the gradual filling up

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[1] For a later phase of this case see *Virginia* v. *West Virginia* (246 U. S. 565), *post,* p. 1751.—Editor.

of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion.

How the land that emerges on either side of a navigable interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the State to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

Arkansas is not affected by judicial determinations involving the boundary in cases to which she was not a party.

The court will appoint a commission to run, locate and designate the boundary line between the two States at the place in question, in accordance with the principles herein stated.

The nature and extent of the erosions and accretions that occurred in the old channel
*160 prior to the avulsion here involved, and the question * whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.

THIS is an original suit in equity brought by the State of Arkansas against the State of Tennessee for the purpose of determining the location of the boundary line between those States along that portion of the bed of the Mississippi River that was left dry as the result of an avulsion which occurred March 7, 1876, when a new channel was formed known as the "Centennial Cut-off."

The cause, having been put at issue by the filing of answer and replication, was brought on to hearing upon stipulated facts, pursuant to an intimation made by this court in *Cissna* v. *Tennessee,* 242 U. S. 195, 198.

The facts are as follows: By the Treaty of 1763 between England, France, and Spain, Art VII (3 Jenkinson's Treaties, 177, 182), the boundary line between the British and French possessions at this place was established as "a line drawn along the middle of the River Mississippi," with consequent recognition of the dominion of France over the Territory now comprising the State of Arkansas, and the dominion of Great Britain over that now comprising the State of Tennessee. By the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80, the territory comprising Tennessee passed to the United States, its westerly boundary being described (Art. II), as "a line to be drawn along the middle of the said River Mississippi." It formed a part of the State of North Carolina. In the year 1790 North Carolina ceded it to the United States (Act of April 2, 1790, c. 6, 1 Stat. 106). In a report made in the following year by Thomas Jefferson, then Secretary of State, and submitted to Congress by President Washington, the bounds of the ceded territory were
*161 described, the western boundary being "the middle of the * river Mississippi." 1 American State Papers, Public Lands, p. 17. And by Act of June 1, 1796, c. 47, 1 Stat. 491, the whole of the territory thus ceded was made a State. By the Louisiana Purchase, under the Treaty of April 30, 1803, 8 Stat. 200, the territory comprising Arkansas was acquired by the United States from France. It was admitted into the Union as a State by Act of June 15, 1836, c. 100, 5 Stat. 50, its easterly boundary being described as "middle of the main channel of the said river."

According to the stipulated facts, the earliest evidence concerning the location of the river at the place in question relates to the year 1823, and is set

forth upon a map made recently by Major Humphreys, purporting to show the conditions as they existed at that time. The river flowed southward past Dean's Island on the Arkansas side, made a bend to the westward at or about the southernmost part of this island, and then swept northerly and westerly around Island No. 37 (Tennessee), a lesser channel known as McKenzie Chute passing between that island and the main Tennessee shore; the main and lesser channels met at the southwestern extremity of Island No. 37, and the river flowed thence southwesterly past Point Able, Tennessee, opposite which it turned again easterly and then northerly, forming what is known as the Devil's Elbow, and flowed thence easterly or northeasterly around Brandywine Point or Island (Arkansas), until it came within a distance of about two miles from the place where it started its northerly turn opposite Dean's Island; and at this point it turned again to the southward. It is agreed that in 1823 the river ran substantially as indicated upon the Humphreys map, and that between that year and the year 1876 the width of the channel, by erosion and caving in of the Tennessee bank south, southwest, and west of Dean's Island, along the mainland and Island No. 37, had in-
*162 creased from its former width of about a * mile or less to a width of 1¼ or 1½ miles, with consequent narrowing of the neck of land opposite Dean's Island. It is a matter in controversy between the parties whether during the same period there were accretions to Dean's Island and Plum Island, in the State of Arkansas, and to Island No. 37 and the shore below Point Able, on the Tennessee side. A steamboat reconnaissance of the river was made by Colonel Suter under the direction of the War Department in 1874, and a map of the place in question was prepared under his direction and is in evidence. There being no proof of material changes in the river between 1874 and 1876, this map, while not shown to be entirely accurate, is agreed to represent the general situation as it existed in the latter year.

On March 7, 1876, the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, so that the old channel around the bend of the elbow (a distance of fifteen to twenty miles) was abandoned by the current, and although it remained for a few years covered with dead water it was no longer navigable except in times of high water for small boats, and this continued only for a short time, since the old bed immediately began to fill with sand, sediment, and alluvial deposits. In the course of time it became dry land suitable for cultivation and to a considerable extent covered with timber. The new channel is called, from the year in which it originated, the "Centennial Cut-off," and the land that it separated from the Tennessee mainland goes by the name of "Centennial Island."

The cut-off and the territory affected by it are the same that are mentioned and dealt with in the cases of *Stockley* v. *Cissna,* 119 Fed. Rep. 812; *State* v. *Muncie Pulp Co.,* 119 Tennessee, 47, and *Stockley* v. *Cissna,* 119 Tennessee, 135. the State of Tennessee, in her answer, pleads and relies upon the first and
*163 second of these cases as judicial * determinations and evidence of the boundary line between the States at the place in question. Their materiality and effect are matters to be determined.

Prior to 1876, notably around "Island 37" and "Devil's Elbow," the bank on one side of the river was high and subject to erosion, the effect of the water against it; while on the opposite side of the bank was a flat or sloping shore, so

that the width of the river was materially affected by the rise and fall of the water, being considerably wider at normal than at low-water stage.

The following questions are submitted for the determination of this court:

(1) Arkansas contends that the true boundary line between the States (aside from the question of the avulsion of 1876) is the middle of the river at low water, that is, the middle of the channel of navigation; whereas Tennessee contends that the true boundary is a line equidistant from the well-defined banks at a normal stage of the river.

(2) Arkansas contends that by the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the river bed which was by the avulsion abandoned, whether the first or the second definition of the middle of the river be adopted; whereas Tennessee contends that the line was affected by the avulsion to the extent indicated by the opinion of the Supreme Court of that State in *State* v. *Muncie Pulp Co.,* 119 Tennessee, 47; that is, that the effect of the avulsion was to press back the line between the two States to the middle of the old channel as it ran previous to the erosions upon the Tennessee banks that occurred between 1823 and 1876.

(3) Tennessee contends that, irrespective of the question of accretions and erosions, it is impossible now to locate accurately the line of the river as it ran in 1876 just prior to the avulsion, and that therefore the line of 1823
*164 * must prevail as the boundary line between the States, where it has been or can be located accurately and definitely; whereas Arkansas insists that there is no real difficulty in locating the middle of the river of 1876.

Upon the determination of these points, the court is to appoint a commission to run, locate, and designate the line. . . .

Mr. Caruthers Ewing, with whom *Mr. John D. Arbuckle,* Attorney General of the State of Arkansas, was on the briefs, for complainant:

The terms "middle of Mississippi River," "middle of the stream of the Mississippi River," "center of the middle thread of the main channel of the Mississippi River," mean the same thing and designate the middle of the river at low water mark—the middle of the channel of navigation. *Iowa* v. *Illinois,* 147 U. S. 1; *Handley's Lessee* v. *Anthony,* 5 Wheat. 375; *Lamb* v. *Rickets,* 11 Ohio St. 311; *Franzini* v. *Layland,* 120 Wisconsin, 72, and many other cases in this and other courts. This court knows that the Mississippi River is sinuous, and that, on one side, in many places, will be found a sloping bank contiguous to which the water is very shallow, and on the opposite side a high bank with the water deep and navigable. If the contention of Tennessee be maintained, then at the point in controversy the navigable or steamboat channel of the river was wholly within the territorial limits of Tennessee or Arkansas dependent upon the nature of the bank at the particular point. This question is important because at low water stage the river would be about one-half mile wide and the line would therefore be about one-quarter of a mile from the high bank. At a normal stage of water the river at the *locus in quo* might be about a mile and a half wide. The line would therefore be about three-fourths of a mile from the high or bluff bank. The difference amounts to a strip of land many miles in length and a quarter of a mile wide, *i. e.,* about 4,000 acres.

*165 * In deciding otherwise and repudiating the rule announced in *Iowa* v. *Illinois, supra,* the Tennessee court (*State* v. *Muncie Pulp Co.,* 119 Tennessee, 47) misconceived earlier decisions in this court and ignored later ones.

It is recognized by all authorities that boundary lines are unaffected by an avulsion. The river's sudden abandonment of its bed left the line between the two States exactly as it existed at the time of this sudden and visible abandonment. *Missouri* v. *Kansas,* 213 U. S. 68; *Missouri* v. *Nebraska,* 196 U. S. 33; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 624; *Washington* v. *Oregon,* 214 U. S. 205; *Whiteside* v. *Norton,* 205 Fed. Rep. 5; and other cases.

Before the avulsion, the boundary line between the States followed the gradual and imperceptible shiftings of the river. What each State lost or gained by gradual and imperceptible shiftings was a permanent loss or gain except and unless these changes were undone as they were made, to wit, gradually and imperceptibly. Gradual and imperceptible changes in property rights and in boundary lines are unaffected by the fact that as the result of an avulsion land which had been lost by erosion is uncovered. The doctrine of reliction only applies when land is uncovered gradually and imperceptibly; it never applies when the recession of the waters from the land is sudden and visible. *Jones* v. *Johnson,* 18 How. 150, 156; *St. Louis* v. *Rutz,* 138 U. S. 226; *Sapp* v. *Frazier,* 51 La. Ann. 1718; *Collins* v. *State,* 3 Tex. App. 323; *Bouvier* v. *Stricklett,* 40 Nebraska, 793; *Noyes* v. *Collins,* 92 Iowa, 566; *Wilson* v. *Watson,* 141 Kentucky, 324; and many other authorities. The case of *Mulry* v. *Norton,* 100 N. Y. 424, is about the only support to be found for the proposition that the doctrine of reliction can be invoked when the land is uncovered by an avulsion. The statement in the court's opinion to this effect is mere *dictum.* See *Matter of City of Buffalo,* 206 N. Y. 319. Land submerged by the sudden and violent action of the sea, as in
*166 *Mulry* v. * *Norton,* is land that is lost by an avulsion and the owner still has title thereto. He simply cannot use the land because it is covered with water. Land thus covered by water belongs to the owner wholly on the principle that an avulsion does not affect property rights and titles. To hold that the doctrine of reliction could be applied to land uncovered as the result of an avulsion would be to hold that boundary lines and property rights are affected by an avulsion, whereas the law is well settled to the contrary.

Mr. G. T. Fitzhugh, with whom *Mr. Frank M. Thompson,* Attorney General of the State of Tennessee, was on the brief, for defendant:

The boundary between Arkansas and Tennessee is a line drawn along the middle of the Mississippi River at a point equidistant between its principal and well-defined banks, at a normal stage of water. It was so fixed by treaty and statute. [Citing the treaties and statutes considered in the early part of the statement, and Shannon's Code of Tennessee, § 80; Code of 1858, § 69.]

As long as water flows over the bed of a navigable stream, considerations of international policy may well support the rule that the boundary in such stream is along the "thalweg" or fairway, and this because the preservation of equality in the navigation of the river is of extreme importance to the nations bounded by such stream. The river is owned jointly by the two adjoining nations, and the purpose of the rule is to secure to both equal rights therein, the superlative one being the right of navigation; but when the water leaves its bed and establishes for itself a new channel, we respectfully urge that principles of equity, equality and right constrain the application of a new rule, which will give to each of the adjoining States an equal moiety in the land over which the water ran, and
*167 which is, by the abandonment * of the stream, rendered fit for cultivation and use. *Iowa* v. *Illinois,* 147 U. S. 1; *Louisiana* v. *Mississippi,* 202 U. S. 1, 49; Chitty's Vattel, 4th Amer. ed., p. 156; 1 Moore International Law Digest, § 156; 8 Ops. Atty. Gen. 177, 178; Almeda, Derecho Publico, Tom. 1, p. 199; *Nebraska* v. *Iowa,* 143 U. S. 359; Sandars' Justinian, 1st Amer. ed., pp. 168, 169;

Missouri v. *Nebraska,* 196 U. S. 23, 36; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535; *Nugent* v. *Mallory,* 145 Kentucky, 824.

It is next insisted by Tennessee that the line should run at a point equidistant between well-defined banks, at a normal stage of water, because this has been the long-established boundary, acquiesced in by both Arkansas and Tennessee and their predecessors in sovereignty for many years. Whatever may have been the proper construction of the Treaties of 1763 and 1783, it is clear that on the admission of Tennessee into the Union the western boundary of the United States was construed to be the "middle of the channel or bed" of the Mississippi River. It was so fixed by the treaty between the United States and Spain in 1795. Congress had no power to include within the territory of Arkansas, through the enabling act admitting it to the Union, territory within the boundaries of Tennessee, because Tennessee was the older State. Constitution, Art. IV, § 3; *Louisiana* v. *Mississippi,* 202 U. S. 40; *Washington* v. *Oregon,* 211 U. S. 127, 134. Arkansas has interpreted the line to be at a point equidistant from the well-defined and permanent banks of the Mississippi River. [Citing cases mentioned in the opinion and *Hearne* v. *State.* 181 S. W. Rep. 291.] Tennessee has recognized the same boundary, and acquiesced therein. *Moss* v. *Gibbs,* 10 Heisk. 283; *Foppiano* v. *Snead,* 113 Tennessee, 167; *State* v. *Muncie Pulp Co.,* 119 Tennessee, 47, 73. Where a State has for many years exercised undisturbed jurisdiction over a particular territory, a prescriptive right arises, which is equally binding under
*168 * principles of justice on States as well as individuals. [Citing the cases on this subject mentioned in the opinion, and *Missouri* v. *Kansas,* 213 U. S. 78, 85.]

The line if fixed at the *filum aquæ* should be determined with reference to the normal stage of water. *State* v. *Burton,* 106 Louisiana, 732; *Hopkins Academy* v. *Dickson,* 9 Cush. 544, 552; *Warren* v. *Inhabitants of Thomaston,* 75 Maine, 329, 332; *Cessill* v. *State,* 40 Arkansas, 501; *State* v. *Muncie Pulp Co., supra.*

The effect of avulsion is to leave the boundary in the abandoned bed of a stream, and it does not carry the boundary to the new channel. *Missouri* v. *Nebraska,* 196 U. S. 33; *State* v. *Muncie Pulp Co., supra; Stockley* v. *Cissna,* 119 Tennessee, 135.

The doctrine of submergence and reappearance of land applies where lands have been submerged and the bed becomes dry, and old boundaries can be located or distinguished. *State* v. *Muncie Pulp Co., supra;* Sir Matthew Hale's *De Jure Maris,* reprinted in Hargrave's Law Tracts, 36, 37, and notes to *In re Jennings,* 6 Cow. 518, 536, and *Mather* v. *Chapman,* 16 Am. Rep. 54; 7 Comyns' Dig., tit. Prerogative, D. 61; 5 Bacon's Abr., tit. Prerogative, p. 495; *Mulry v. Norton,* 100 N. Y. 424; *Morris* v. *Brook,* repr. Am. Reps. 206; *St. Louis* v. *Rutz,* 138 U. S. 226; *Stockley* v. *Cissna,* 119 Fed. Rep. 812; *Stockley* v. *Cissna,* 119 Tennessee, 135, 171; *Hughes* v. *Heirs of Birney,* 107 Louisiana, 664; *Chicago* v. *Lord,* 169 Illinois, 392; *Widicombe* v. *Rosemiller,* 118 Fed. Rep. 295; *Randolph* v. *Hinck,* 277 Illinois, 11.

In boundary disputes between nations the same rules will be applied as apply between individuals. *Trustees* v. *Hopkins,* 8 Porter, 9; *Nebraska* v. *Iowa,* 143 U. S. 359; 8 Ops. Atty. Gen. 175.

Tennessee contends that after the old channel ran dry, the owners of the banks and the bed should be restored to their own, according to the original
*169 boundaries fixed before * the river changed its course or moved laterally in its bed, such lands being still susceptible of definite location.

Mr. Justice Pitney, after stating the case as above, delivered the opinion of the court.

Concerning the proper location of an interstate boundary line with reference to the shores and channel of a navigable river separating one State of the Union from another, much has been written. The subject was brought under a consideration of this court in *Iowa* v. *Illinois,* 147 U. S. 1. In that case, Illinois contended that the boundary followed the middle of the channel of commerce, that is, the channel commonly used by steamboats and other craft navigating the river; while on the part of Iowa it was insisted that the line ran in the middle of the main body of the river, taking the middle line between its banks and shores, irrespective of where the channel of commerce might be, and that the measurements must be taken at ordinary stage of water. The contention of each State was supported by a decision of its court of last resort: *Dunlieth & Dubuque Bridge Co.* v. *County of Dubuque,* 55 Iowa, 558, 565; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535, 548. This court recognized these cases as presenting in the clearest terms the different views as to the line of jurisdiction between neighboring States separated by a navigable stream, and thereupon proceeded to analyze their reasoning and doctrine. From a review of the authorities upon international law, it was declared that when a navigable river constituted the boundary between two independent States the interest of each State in the navigation, and the preservation by each of its equal right in such navigation, required that the middle of the channel should mark the boundary up to which each State on its side should exercise jurisdiction; that hence, *170 in international law, and by the usage of European * nations, the term "middle of the stream," as applied to a navigable river, meant the middle of the channel of such stream, and that in this sense the terms were used in the treaty between Great Britain, France, and Spain, concluded at Paris in 1763, so that by the language "a line drawn along the middle of the River Mississippi," as there used, the middle of the channel was indicated; that the *thalweg,* or middle of the navigable channel, is to be taken as the true boundary line between independent States for reasons growing out of the right of navigation, in the absence of a special convention between the States or long use equivalent thereto; and that although the reason and necessity of the rule may not be as cogent in this country, where neighboring States are under the same general government, yet the same rule must be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law; and that the Illinois Enabling Act of April 18, 1818, § 2, c. 67, 3 Stat. 428, which made "the middle of the Mississippi river" the western boundary of the State, the Missouri Enabling Act of March 6, 1820, § 2, c. 22, 3 Stat. 545, which adopted "the middle of the main channel of the Mississippi river" as the eastern boundary of that State, and the Wisconsin Enabling Act of August 6, 1846, c. 89, 9 Stat. 56, which referred to "the centre of the main channel of that river," employed these varying phrases as signifying the same thing. Hence we reached the conclusion (p. 13) that as between the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream, the controlling consideration "is that which preserves to each State equality in the right of navigation in the river." It was accordingly adjudged and declared that the boundary line between the contesting States was "the middle of the main navigable channel of the Mississippi River"; and a final decree to that effect was afterwards made, 202 U. S. 59.

*171 * The rule thus adopted, known as the rule of the *"thalweg,"* has been treated as set at rest by that decision. *Louisiana* v. *Mississippi,* 202 U. S. 1, 49; *Washington* v. *Oregon,* 211 U. S. 127, 134; 214 U. S. 205, 215.

The argument submitted in behalf of the defendant State in the case at bar, including a reference to the notable recent decision of its Supreme Court in *State* v. *Muncie Pulp Co.* (1907), 119 Tennessee, 47, has failed to convince us that this rule ought now, after the lapse of twenty-five years, to be departed from.

It is said that Arkansas has interpreted the line to be at a point equidistant from the well-defined and permanent banks of the river, that Tennessee has likewise recognized this boundary, and that by long acquiescence on the part of both States in this construction, and the exercise of jurisdiction by both in accordance therewith, the question should be treated as settled. The reference is to certain judicial decisions, and two acts of legislation. In *Cessill* v. *State* (1883), 40 Arkansas, 501, which was a prosecution for unlicensed sale of liquors upon a boat anchored off the Arkansas shore, it was held that the boundary line, as established by the original treaties and since observed in federal legislation, state constitutions, and judicial decisions was the "line along the river bed equidistant from the permanent and defined banks of the ascertained channel on either side." This was followed in subsequent decisions by the same court. *Wolfe* v. *State* (1912), 104 Arkansas, 140, 143; *Kinnanne* v. *State* (1913), 106 Arkansas, 286, 290. The first pertinent decision by the Supreme Court of Tennessee is *State* v. *Muncie Pulp Co.* (1907), 119 Tennessee, 47, in which a similar conclusion was reached, partly upon the ground that it had been adopted by the courts of Arkansas. The legislative action referred to consists of two acts of the General Assembly of the State of Tennessee (Acts 1903, p. 1215, c. 420; Acts 1907, p. 1723, c. 516), each of which authorized *172 the * appointment of a commission to confer and act with a like commission representing the State of Arkansas to locate the line between the States in the old and abandoned channel at the place that we now have under consideration; and the Act of 1907 further provided that if Arkansas should fail to appoint a commission, the Attorney General of Tennessee should be authorized to institute a suit against that State in this court to establish and locate the boundary line. These acts, far from treating the boundary as a line settled and acquiesced in, treat it as a matter requiring to be definitely settled, with the coöperation of representatives of the sister State if practicable, otherwise by appropriate litigation.

The Arkansas decisions had for their object the establishment of a proper rule for the administration of the criminal laws of the State, and were entirely independent of any action taken or proposed by the authorities of the State of Tennessee. They had no particular reference to that part of the river bed that was abandoned as the result of the avulsion of 1876; on the contrary, they dealt with parts of the river where the water still flowed in its ancient channel. The decision of the Supreme Court of Tennessee in *State* v. *Muncie Pulp Co.,* 119 Tennessee, 47, sustained the claim of the State to a part of the abandoned river bed which, by the rule of the *thalweg,* would be without that State. The combined effect of these decisions and of the legislation referred to, all of which were subsequent to the year 1876, falls far short of that long acquiescence in the practical location of a common boundary, and possession in accordance there-

with, which in some of the cases has been treated as an aid in setting the question at rest. *Rhode Island* v. *Massachusetts,* 4 How. 591, 638, 639; *Indiana* v. *Kentucky,* 136 U. S. 479, 510, 514, 518; *Virginia* v. *Tennessee,* 148 U. S. 503 522; *Louisiana* v. *Mississippi* 202 U. S. 1, 53; *Maryland* v. *West Virginia,* 217 U. S. 1, 41.

*173 * Therefore we find it unnecessary to decide whether the supposed agreement between the States respecting the boundary would be valid without the consent of Congress, in view of the third clause of § 10 of Art. 1 of the Constitution of the United States.

The next and perhaps the most important question is as to the effect of the sudden and violent change in the channel of the river that occurred in the year 1876, and which both parties properly treat as a true and typical avulsion. It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. *New Orleans* v. *United States,* 10 Pet. 662, 717; *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178, 189; *Nebraska* v. *Iowa,* 143 U. S. 359, 361, 367, 370; *Missouri* v. *Nebraska,* 196 U. S. 23, 34–36.

There is controversy with respect to the application to the foregoing rule to the particular circumstances of this case. It is insisted in behalf of the State of Tennessee that since the rule of the *thalweg* derives its origin from the equal rights of the respective States in the navigation of the river, the reason for the rule and therefore the rule itself ceases when navigation has been rendered impossible by the abandonment of a portion of the river bed as the result of an avulsion. In support of this contention we are referred to some expressions of Vattel, Almeda, Moore, and other writers; but we deem them inconclusive,

*174 * and are of the opinion, on the contrary, that the contention runs counter to the settled rule and is inconsistent with the declarations of this court, in *Nebraska* v. *Iowa,* 143 U. S. 359, 367, that "avulsion would establish a fixed boundary, to wit: the centre of the abandoned channel," or, as it is expressed on page 370, "the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel," and in *Missouri* v. *Nebraska,* 196 U. S. 23, 36, that the boundary line "must be taken to be the middle of the channel of the river as it was prior to such avulsion."

It is contended, further, that since the avulsion of 1876 caused the old river bed to dry up, what is called "the doctrine of the submergence and reappearance of land" must be applied, so as to establish the ancient boundary as it existed at the time of the earliest record, in this case the year 1823, with the effect of eliminating any shifting of the river bed that resulted from the erosions and accretions of the half century preceding the avulsion.

This contention is rested chiefly upon a quotation from Sir Matthew Hale, *De Jure Maris,* c. 4: "If a subject hath land adjoining the sea, and the violence

of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years." (1 Hargraves' Law Tracts, 15; Note to *Ex parte Jennings,* 6 Cow. 542.) To the same effect, 2 Roll. Abr. 168 1, 48; 7 Comyns' Dig., tit. Prerogative, D. 61, 62; 5 Bacon's Abr. tit. Prerogative, B. 1. A reference to the context shows that the portion quoted is a statement of one of several
*175 exceptions to the general rule that any increase * of land *per relictionem,* or sudden recession of the sea, belonged of common right to the King as a part of his prerogative. It amounts to no more than saying that where the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification. Such a case was *Mulry* v. *Norton,* 100 N. Y. 424, the true scope of which decision was pointed out in *In re City of Buffalo,* 206 N. Y. 319, 326, 327. But this doctrine has no proper bearing upon the rule we have stated with reference to boundary streams. Certainly it cannot be regarded as having the effect of carving out an exception to the rule that where the course of the stream changes through the operation of the natural and gradual processes of erosion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel. To give to it such an effect is, we think, to misapply the rule quoted from Sir Matthew Hale.

How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter
*176 to be determined * according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. *Pollard's Lessee* v. *Hagan,* 3 How, 212, 230; *Barney* v. *Keokuk,* 94 U. S. 324, 338; *Hardin* v. *Jordan,* 140 U. S. 371, 382; *Shively* v. *Bowlby,* 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *Water Commissioners,* 168 U. S. 349, 358; *Scott* v. *Lattig,* 227 U. S. 229, 242. Thus, Arkansas may limit riparian ownership by the ordinary high-water mark; (*Railway* v. *Ramsey,* 53 Arkansas, 314, 323; *Wallace* v. *Driver,* 61 Arkansas, 429, 435, 436;) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark (*Elder* v. *Burrus,* 25 Tennessee [6 Humph.], 358, 368; *Martin* v. *Nance,* 40 Tennessee [3 Head],

649, 650; *Goodwin* v. *Thompson,* 83 Tennessee [15 Lea], 209), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State* v. *Muncie Pulp Co.,* 119 Tennessee, 47. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

It is hardly necessary to say that *State* v. *Muncie Pulp Co., supra,* and *Stockley* v. *Cissna,* 119 Fed. Rep. 812, relied upon in defendant's answer as judicial determinations of the boundary line, can have no such effect against the State of Arkansas, which was a stranger to the record in both cases.

Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

*177 * (1) The true boundary line between the States, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

(2) By the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

(3) The boundary line should now be located according to the middle of that channel as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.

(4) A commission consisting of three competent persons, to be named by the court upon the suggestion of counsel, will be appointed to run, locate, and designate the boundary line between the States at the place in question in accordance with the above principles.

(5) The nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876, and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.

The parties may submit the form of an interlocutory decree to carry into effect the above conclusion.[1]

State of Virginia v. State of West Virginia, et al.

Supreme Court of the United States, 1918.

[246 *United States,* 565.]

A suggestion now made for the first time by West Virginia, viz., that that State has an interest in an alleged right of Virginia against the United States respecting lands of the Northwest Territory, presents no ground for not enforcing the judgment heretofore rendered.

The judgment heretofore rendered can not now be attacked upon the ground that in

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[1] For a later phase of this case see *Arkansas* v. *Tennessee* (247 U. S. 461), *post,* p. 1774.—Editor.

original cases in this court one State can not recover from another in a mere action of debt.

The suit, however, was more than a mere action to collect a debt.

The principle which forbids the production of state governmental inequality by affixing conditions to a State's admission is irrelevant to the question of power to enforce the contract in this case.

The original jurisdiction conferred upon this court by the Constitution over controversies between States includes the power to enforce its judgment by appropriate remedial processes, operating where necessary upon the governmental powers and agencies of a State.

The authority to enforce its judgments is of the essence of judicial power. That this elementary principle applies to the original jurisdiction in controversies between States has been universally recognized as beyond dispute, as is manifested by the numerous cases of the kind which have been decided, in not one of which hitherto, since the foundation of the Government, has a State done otherwise than voluntarily respect and accede to the judgment.

The provision granting this jurisdiction examined as to its origin and purpose, together with the closely related provisions prohibiting interstate agreements without the consent of Congress and depriving the States of army and war-making powers and vesting them in Congress, the result being to show the clear intention of the Constitution, conceived out of regard for the rights of all the States and for the preservation of the Constitution itself, to forestall for the future the dangers of state controversies by uniting with the power to decide them the power to enforce the decisions against the state governments.

*566 To this power the reserved powers of the States necessarily are subordinate.

The powers to decide and enforce, comprehensively considered, are sustained by every authority of the Federal Government, judicial, legislative and executive, which may be appropriately exercised.

The vesting in Congress of complete power to control agreements between States clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from the States.

It follows, by necessary implication, that the power of Congress to grant or withhold assent to such contracts carries with it the duty and power to see to their enforcement when made operative by its sanction.

This power is plenary, limited only by the general rule that acts done for the exertion of a power must be relevant and appropriate to the power exerted.

As a national power it is dominant and not circumscribed by the powers reserved to the States.

The power of Congress to legislate for the enforcement of a contract between two States under the circumstances here presented is not incompatible with the grant of original jurisdiction to this court to entertain a suit on the same subject.

The power of Congress also extends to the creation of new judicial remedies to meet the exigency occasioned by the judicial duty of enforcing a judgment against a State under the circumstances here presented.

Out of consideration for the character of the parties, and in the belief that the respondent State will now discharge its plain duty without compulsion, and because the case is such that full opportunity should be afforded to Congress to exercise its undoubted power to legislate, the court abstains from determining what judicial remedies are available under existing legislation and postpones the case, for future argument upon the following questions: (1) Whether mandamus compelling the legislature of West Virginia to

levy a tax to pay the judgment is an appropriate remedy. (2) Whether the power and duty exist to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. (3) Whether, if necessary, the
*567 judgment may be executed through some * other equitable remedy, dealing with such funds or taxable property of West Virginia, or rights of that State, as may be available.

Right is reserved in the meantime to appoint a master to examine and report concerning the amount and method to taxation, whether by the state legislature or through direct action, essential to satisfy the judgment, as well as concerning the means otherwise existing in West Virginia which, by the exercise of equitable power, may be made available to that end.

On January 29, 1917, Virginia submitted her motion for leave to file a petition for a writ of mandamus, and for an order directed to the State of West Virginia and the members of her legislature requiring them to show cause why the writ should not issue, commanding the levy of a tax to satisfy the judgment heretofore recovered by Virginia. The motion was granted February 5, 1917, and the rule issued returnable March 6th following. The present decision arose upon the respondents' motion to discharge the rule, submitted on the latter date.[1]

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[1] The Reporter has decided to reproduce the petition and motion, believing that they will add to the future, if not to the immediate, value of the report. He regrets that, in doing this, the attached exhibits and the names of numerous respondents have been perforce omitted, for lack of space. The captions have been left off also. The petition is as follows:

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of the Commonwealth of Virginia by John Garland Pollard, her Attorney General, shows to the Court that:

I.

The Commonwealth of Virginia filed a Bill in this Court on leave on February 26, 1906, against the State of West Virginia praying that the State of West Virginia's proportion of the public debt of Virginia, as it stood prior to 1861, be ascertained and satisfied.

II.

On June 14, 1915, this Court entered its decree and judgment in the suit as follows:

"SUPREME COURT OF THE UNITED STATES.

Original No. 2. October Term, 1914.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

"This cause came to be heard on pleadings and proofs, the reports of the Special Master and the exceptions of the parties thereto, and was argued by counsel.

"On consideration whereof, the Court finds that the defendant's share of the debt of the complainant is as follows:

"Principal, after allowing credits as stated, $4,215,622.28; interest from January 1, 1861, to July 1, 1891, at four per cent per annum, $5,143,059.18; interest from July 1, 1891, to July 1, 1915, at three per cent per annum, $3,035,248.04, making a total of interest of $8,187,307.22, which, added to the principal sum, makes a total of $12,393,929.50.

"It is therefore now here ordered, adjudged and decreed by this Court that the complainant, Commonwealth of Virginia, recover of and from the defendant, State of West Virginia, the sum of $12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum.

"It is further ordered, adjudged and decreed that each party pay one-half of the costs.

"June 14, 1915."

*568 * *Mr. John Garland Pollard,* Attorney General of the State of Virginia, *Mr. Wm. A. Anderson, Mr. Randolph Harrison, Mr. John G. Johnson* and *Mr. Sanford Robinson,* for petitioner:

In view of the answer of West Virginia, which stated that it had no *569 property subject to execution, and of its claim * that this court cannot bring about a payment of its decree by the issuance of writ of mandamus or of any other process, the present record presents this question: "If, as the result of a controversy between two States, a decree is entered by this court *570 against one, in favor of the other, * is the court unable, despite the pecuniary ability of the debtor, to compel payment?"

Past records disclose cases in which municipal bodies have repudiated their sealed obligations; but the State of West Virginia presents, perhaps, the first *571 instance in * which one of the great Commonwealths of the Union has repudiated the duty imposed upon it to satisfy a debt decreed to be paid by it.

*572 * We will not dignify the suggestion of a defense because of an alleged conditional deed delivered in 1783, with notice, for the obvious reason that not only is the claim upon its own face unworthy of notice, but

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III.

The said judgment and decree has ever since remained and is now unpaid. The State of West Virginia has failed to pay the Commonwealth of Virginia the same, or any part thereof, although payment has been respectfully requested by the Commonwealth of Virginia, of the State of West Virginia.

IV.

The correspondence showing the request of the Commonwealth of Virginia to the State of West Virginia for the payment of said decree and judgment, and the correspondence relating to a proposed joint conference of the Debt Commissions of the two States, as suggested by the West Virginia Commission, are hereto attached and made a part of this petition.

From said correspondence it will appear:

That on October 19, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia, requesting that provision be made for the payment of said decree and judgment.

That on October 28, 1915, the Governor of West Virginia replied that he had convened the West Virginia Debt Commission, and in conjunction with them had reached the conclusion that it would be to the advantage of both States to have a joint conference of the Commissions of the two States at the earliest date possible.

That on November 12, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, replied, suggesting that the proposed joint conference be held on November 23, 1915.

That on November 12, 1915, the Governor of West Virginia replied by telegram that he would communicate with the members of the West Virginia Commission and would later reply further, which later reply was duly received November 19th, and was to the effect that the West Virginia Commission would probably not be able to have the joint conference, or meeting, before some time early in December, of which he would advise the Virginia Commission later.

That on December 6, 1915, no further advice having been received from the Governor of West Virginia, the Chairman of the Virginia Debt Commission addressed another letter to the Governor of West Virginia, expressing the hope that the Virginia Commission might receive a reply at an early date.

To this letter, addressed on December 6, 1915, to the Governor of West Virginia, no reply has been received.

V.

On June 5, 1916, the Commonwealth of Virginia moved the Court to issue its writ of execution directed to the Marshal of this Court against the State of West Virginia, directing the Marshal of this Court to levy upon the property of the State of West Virginia, subject to such levy, for the satisfaction of the decree and judgment in the suit of the Commonwealth of

*573 because one State cannot liquidate an indebtedness owing by it to * another State, by setting up a claim that there is an indebtedness owing to it by the United States. Presumably, a claim against a party, thought unworthy of notice, between 1783 and 1910, would not go far in 1917 towards liquidating an indebtedness owing by a second party to a third.

*574 The claim of inability on the part of this court to * enforce its decree, is one of far-reaching importance. If it be sustained, its decrees will be little better than waste paper.

Our contention is, that though a decree may fail of liquidation because *575 of the debtor's lack of funds, it can * never thus fail where the debtor is abundantly able to pay and where a body in the State has power to appropriate the State's funds to that purpose.

Upon each of the three great departments of the National Government are imposed duties, and each, either expressly or impliedly, is vested with powers to perform them. The makers of the Constitution, where they imposed *576 * a duty, granted the power to perform it. Owing to the commercial, and other, relations, between the States, it was extremely probable that transactions would arise which would result in indebtedness by one to another. It *577 was therefore, in view of the abandonment of absolute * independence, imperatively necessary that some method should be devised by which the

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Virginia against the State of West Virginia herein above mentioned, and that the Commonwealth of Virginia be granted such other and further relief in the premises as was just and meet. This Court denied the motion for the reason stated in the opinion of the Court. [241 U. S. 202.]

VI.

The answer and return of the State of West Virginia to the petition and motion of the Commonwealth of Virginia for a writ of execution asserted that the writ of execution prayed for by the Commonwealth of Virginia should not be issued for the following, among other, reasons, and upon the following, among other, grounds:

"Because not only presumptively, but in fact, the State of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was, and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution."

VII.

On November 14, 1916, the Virginia Debt Commission learning that the Governor of West Virginia was about to convene the Legislature of West Virginia in extra session, through its Chairman telegraphed the Governor of West Virginia requesting him to include in the call to be issued for that purpose, as one of the matters to be considered, the settlement of the decree of this Court rendered in favor of Virginia in the suit of the State of Virginia against West Virginia, to which the Governor of West Virginia replied by telegraph, on November 15, 1916, giving as his reasons for not embodying the matter of the debt settlement in his call, that the time the Legislature would be in session was too short for a proper consideration of the matter, and, in addition, that on the second Wednesday of January, 1917, the Legislature would convene in regular session composed, with the exception of hold-over Senators, of newly-elected members to whom, as the Governor thought, the question should be submitted, copies of which telegrams are hereto annexed and made a part of this petition. Thereafter, on or about November, 1916, the Governor of West Virginia issued a call convening the Legislature of West Virginia in extra session, and did not include in said call as one of the matters to be considered, the settlement of the decree of this Court in favor of Virginia in the suit of Virginia against West Virginia. Thereafter, in November, 1916, the Legislature of the State of West Virginia met in extra session and remained in session until December 1, 1916, without giving any consideration in any respect to the settlement of said decree of this Court.

VIII.

On December 29, 1916, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia requesting

existence of indebtedness could be determined, and its collection enforced. There was but one department by which this result could be attained, *i. e.,* the judicial department.

*578 By Art. III of the Constitution it was required that * there should be one Supreme Court, though it was permitted to Congress, from time to time, to ordain and establish inferior courts. It was provided that the judicial power should extend to many enumerated cases and: "2. To controversies *579 between two or more States." If the contention * of West Virginia be sustained, this clause created not "judicial *power,*" but "judicial impotence." The power conferred over controversies between two or more States was conferred in precisely the same way that power was conferred over *580 controversies "between citizens of * different States" or "between a State and citizens of another State."

We are, therefore, in the present controversy, presented with a case in which the court proceeded because judicial power so to do had been expressly vested in it by the Constitution of the United States. It was necessary for it to enter its decree in favor of the plaintiff or of the defendant. The decree which was entered was in the performance by this court of a duty imposed upon it.

Can it possibly be that nothing more was intended by the Constitution than that this court should go through the useless, and meaningless, work of merely

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him by a special message to urge upon the Legislature, soon to assemble, the prompt enactment of such legislation as may be requisite to provide the proper means for the liquidation of the decree entered against the State of West Virginia in favor of the Commonwealth of Virginia, and on said December 29, 1916, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, also addressed a letter to the President of the Senate and the Speaker of the House of Delegates of the State of West Virginia, requesting that the Legislature of the State of West Virginia at its coming session take such steps and make such enactments as may be necessary to insure the prompt payment of the aforesaid indebtedness, to which letters the Governor of the State of West Virginia replied by a communication dated January 9, 1917, and the President of the Senate replied by communication dated January 11, 1917, respectively, copies of which letters are hereto annexed and made a part of this petition. No reply has as yet been received from the Speaker of the House of Delegates.

IX.

The West Virginia Legislature convened on January 10, 1917, and since that date has been in session at the Capitol in Charleston, West Virginia.

The Legislature of the State of West Virginia consists of the Senate and the House of Delegates.

The members of the Senate of the State of West Virginia are Honorables [here follow their names].

The members of the House of Delegates of the State of West Virginia are [here follow their names].

The Honorable Wells Goodykoontz is the President of the Senate, and Honorable Joseph S. Thurmond is the Speaker of the House of Delegates of the State of West Virginia.

X.

It was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the aforesaid Senators and Members of the House of Delegates thereof, to take the necessary steps and make the necessary enactments to provide for the payment of the said judgment of $12,393,929.50, with interest and costs as provided in said judgment, upon the convening of said Legislature on January 10, 1917, but, although respectfully requested to do so by your petitioner, the Legislature and the members thereof have taken no step and have made no enactment to provide for, or insure payment of the aforesaid indebtedness. Nor have any steps been taken by the Legislature, or the Senate, or the House of Delegates to give any indication or hope that the Legislature will, or intends to make provision for the payment of said indebtedness. On the contrary the Governor of West Virginia, in a special message on the "Virginia Debt," submitted to the Legislature of that State

making a suggestion to the State of West Virginia that it owed to the State of Virginia a designated amount of money, which it would be right for it to consent to pay? Would such a proceeding, thus ending in naught, have been in exercise of "judicial power"?

When jurisdiction was given to this court, in controversies between citizens of different States, and in cases of admiralty, and in controversies to which the United States should be a party, it was not deemed necessary to prescribe the process of execution or command which would compel performance of its decrees. With the grant of the power went, by necessary implication, the ability to exercise it in usual methods. It may well be that this court has no power, itself, to levy a tax. This power rests in the legislatures of the different States. There are several cases in which this court has said that of itself, and by itself, it has no such power of tax assessment. What it does possess, however, is the power to coerce the performance by the legislature of a duty necessary to be performed, in order to effectuate its decrees.

Rees v. *Watertown,* 19 Wall. 107, and *Meriwether* v. *Garrett,* 102 U. S. 472, relate to the judicial inability to levy taxes directly, not questioning the
*581 power to compel their levy in proper cases by those who are authorized * to do so. *Cf. Supervisors* v. *United States,* 4 Wall. 435; *Heine* v. *Levee Commissioners,* 19 Wall. 655.

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on January 18, 1917, a copy of which is attached hereto, recommended that the Legislature

> "present to the Court a petition for a re-hearing of the matter of the interest upon the debt;"

and further recommended that

> "Provision should be made also by the Legislature for having presented to the Supreme Court of the United States the contentions of West Virginia as to why Virginia should be restrained from pressing her claim against West Virginia further, until the State of Virginia sues in the Court of Claims, as I am informed she can, for the purpose of recovering her claim growing out of the cession of the Northwest Territory, and thereby reducing the joint assets of the two States to a common fund, which will place the States in a position to receive their proportionate credits and to end further litigation."

And concluded with the expression of the hope

> "that some suggestion will be forthcoming that will result in the protection of the interests of our State in this litigation, and bringing about the consideration of further equities which West Virginia is entitled to receive, and after the proper equities have been conceded to the State, the prompt liquidation of the residue, if any there be."

XI.

Under the Constitution of the State of West Virginia the session of the Legislature now convened will be adjourned on or before the 24th day of February, 1917, unless, by the concurrence of two-thirds of the members elected to each house, its session shall be further continued beyond said date; and the Legislature must assemble biennially and can not assemble oftener unless convened by the Governor.

In consequence of the time which has already elapsed without any effort being made by said Legislature to perform its duty in the matter of making provision for the payment of the said decree and judgment, there will be insufficient time therefor unless the Legislature promptly, and without further delay performs its said duty.

Your petitioner avers that it is not the intention of the authorities of West Virginia to take any steps by legislation, or otherwise, to make provision for the payment of the said judgment and decree, but that it is the intention to delay making provision for such payment under the pretexts set forth in the letter from the Governor of West Virginia dated January 9, 1917, and in the special message submitted to the Legislature of that State on January 18, 1917, copies of which are hereto attached, until it will be too late for the Legislature of West Virginia now assembled to take any action in the premises.

It is further averred that your petitioner is without remedy in the premises unless this Court shall command the Senators and Members of the House of Delegates of the State of West Virginia to assess and levy a tax upon the property in the State of West Virginia

In *Louisiana* v. *Jumel,* 107 U. S. 711, the bondholders' right was denied because of their inability to sue the State. The court however said: "When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose."

There is no magic in the word "sovereignty," where a State had been subjected to a decree by this court to pay an indebtedness. The power of this court in all cases in which it has jurisdiction over a State, is necessarily supreme. There is no practical difference in the degree of power to be exercised in ordering municipal officers to levy a tax to pay a judgment against the municipality, and in requiring a state legislature to make such a levy in a case like this. The remedy which is asked for in this case is one which is always pursued in the case of a governmental body, municipal or otherwise, which is indebted and which fails to pay or is unable to pay under execution.

In the present case, West Virginia has no funds which can be seized. All its property is in public use. It is, however, a very prosperous Commonwealth, abundantly able, by taxation, to liquidate all its indebtedness.

Its legislature is vested with an unrestricted power to levy taxes to meet its liabilities.

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to provide for the payment of said judgment and decree according to the terms thereof, as they are in duty bound to do.

WHEREFORE, your petitioner, Commonwealth of Virginia, prays that a rule be made and issued from this Court, directed to the said Honorable Wells Goodykoontz, President of the Senate, Honorables . . . Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables . . . Members of the House of Delegates of the State of West Virginia, to show cause why a writ of mandamus should not issue commanding the said Honorable Wells Goodykoontz, President of the Senate, Honorables . . . Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables . . . Members of the House of Delegates of the State of West Virginia, forthwith and at the present session of the Legislature to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment of $12,393,939.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum, and costs, according to the terms of said judgment, unless the Legislature shall forthwith and at its present session make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash, and for such other and further relief in the premises as shall seem just and meet; and your petitioner will ever pray, etc.

COMMONWEALTH OF VIRGINIA,
By JOHN GARLAND POLLARD,
Attorney General of Virginia.

The motion is as follows:

And now come the respondents, the State of West Virginia and Wells Goodykoontz, President of the West Virginia Senate, et al., being all the members of said Senate, and Joseph S. Thurmond, Speaker of the House of Delegates of the State of West Virginia, et al., being all the members of said House of Delegates. and move to quash the rule awarded against them at the prayer of the Commonwealth of Virginia upon the 5th day of February, 1917, ordering them to show cause before this Court on the 6th day of March, 1917, why a writ of mandamus should not issue against them as prayed, and assign as grounds of said motion the following:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment.

This court cannot compel the exercise of discretion in a legislature; but it can compel the performance of a duty where such performance is necessary, in order that its decrees may not be treated as idle words. It is the duty of the legislature to levy taxes sufficient to meet its indebtedness. There is no *582 pretense in any of its pleadings * that it cannot, by taxation, procure amply sufficient means.

Mandamus is a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, it becomes a substitute for the ordinary process of execution to enforce the payment of the same. *Supervisors* v. *United States,* 4 Wall. 435; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535; *City of Galena* v. *Amy,* 5 Wall. 705; *Riggs* v. *Johnson County,* 6 Wall. 166; *Walkley* v. *City of Muscatine,* 6 Wall. 481; *Labette County Commissioners* v. *Moulton,* 112 U. S. 217.

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of a mandamus is to be determined. *Kendall* v. *United States,* 12 Pet. 524, 617; *Marbury* v. *Madison,* 1 Cranch, 137, 170.

This court has taken jurisdiction of this case and jurisdiction includes the power to enforce the execution of what is decreed. Blackstone (Cooley's ed.), p. 242; *Riggs* v. *Johnson County,* 6 Wall. 166, 187.

As we have said, the legislature of West Virginia is under an express constitutional obligation to provide for the payment of the amount ascertained by the

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rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.

And now, by leave of Court, these respondents, without waiving their motion to discharge said rule, or any of the grounds assigned in support thereof, make further return thereunto as follows:

I. They deny, as charged in the tenth paragraph of the petition of the relator, that it was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the members of her Senate and House of Delegates, upon the convening of said Legislature on January 10, 1917, to take the necessary steps and make the necessary enactments providing for the payment of the judgment in favor of the State of Virginia against the State of West Virginia, and described in said petition. On the contrary, they say that their duties in the premises, and under the 8th Section of the 8th Article of the Constitution of West Virginia of 1863, were, and are, not ministerial, but legislative, deliberative and discretionary; and they further say that, instead of omitting or neglecting their duty as charged in the petition, upon the convening of the Legislature on January tenth, or shortly thereafter, the Senate and House of Delegates, each for itself, appointed a committee, with authority to hear arguments, report upon resolutions and recommend appropriate measures looking to the settlement of the judgment rendered at the suit of Virginia against West Virginia, which committees were ready to begin their sittings and to enter upon their work at the time of the presentation of the petition of the relator to this Court; but that since said time, and in consequence of said petition and the rule ordered thereon upon the 5th day of February, 1917, all matters relating to the settlement of said judgment have been suspended and held in abeyance, except that, on the 21st day of February, a joint resolution was adopted by both houses of the Legislature, directing the Attorney General of the State and associate counsel to make appearance and defence, in the name and on behalf of the State of West Virginia and the several members constituting the Senate and House of Delegates thereof, to the rule in mandamus issued herein; and said resolution further provided that, in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon said rule, whether its judgment be for or against the State of West Virginia, the Governor is requested to convene the Legislature in special session as soon as may be for the purpose of doing without delay what should be done in the premises.

A copy of said resolution is filed herewith as a part hereof.

court to be due. The obligation to do so is part of the contract upon which the judgment is founded. See § 8, Art. VIII, of the Constitution of West Virginia, which became operative and was in force when she was admitted into the Union on June 20, 1863; and also the opinion of the court, per Mr. Justice Holmes, in *Virginia* v. *West Virginia,* 220 U. S. 1, 30.

Should the legislature see fit to raise the money by creating a bonded indebtedness, it may thus save the necessity of a large immediate levy. Its primary duty, however, is to pay the debt, and the only discretion conferred upon it is to determine whether it will pay it by exercising one power or another. Its duty is to exercise a power which will force payment. The issue raised
*583 by * West Virginia as to the judicial power to use an ordinary judicial remedy to enforce a judicial decree, is most momentous. The question, however, seems to us, though we state the fact most respectfully, one not difficult of solution.

Mr. E. T. England, Attorney General of the State of West Virginia, and *Mr. John H. Holt,* for respondents:

A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State to enact a revenue law, or to lay a tax for state purposes, would infringe upon the rights of the States expressly reserved by the Tenth Amendment to the Federal Constitution.

II. Further answering, these respondents say that they are advised that the writ of mandamus is a discretionary writ, and that this Court will exercise its discretion against the issuance thereof if to issue the same would give an undue advantage to the relator, or operate unjustly against the respondents; and they say that it should not be issued in this case for the following reasons:

These respondents are informed and believe, and upon such information and belief say, that the State of Virginia has a claim against the Government of the United States for many millions of dollars, which should be collected, and, when collected, that the State of West Virginia should participate therein in the same ratio that she, the State of West Virginia, is compelled by the judgment of this Court to contribute to the payment of Virginia's *ante bellum* debt; that is to say, she should be paid out of said claim by the State of Virginia 23½% thereof.

And they further say that they are advised that the State of Virginia alone can take steps for the collection of said claim, and are informed that Virginia has taken no such steps, but has to the present time withheld, and still withholds, from any effort to reduce this common asset to possession, and yet seeks to compel the State of West Virginia to pay her proportion of the common debt, and thus denies her the opportunity to share in the common assets.

They further say that the equity aforesaid was not passed upon by this Court in the settlement of the controversy between Virginia and West Virginia, and could not have been, because the United States was not a party thereto, and could not have been, but that the State of Virginia could have theretofore impleaded the United States in the Court of Claims upon the claim aforesaid, and reduced the same to possession, so that West Virginia could have asserted, and this Court could have allowed, her right to participation therein, but she did not, but then failed and refused, and still fails and refuses, so to do.

These respondents further say that the origin, nature and history of the claim aforesaid is as follows:

Prior to the adoption of the articles of confederation entered into by the thirteen original States, Maryland refused to sign the same, unless and until those States holding western territory should surrender the same to the United States. The State of Virginia at the time laid claim to all that territory lying northwest of the Ohio River out of which the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota have since been formed; and, by an Act of her General Assembly passed at a session commencing on the 20th day of October, 1783, and for the purpose of expediting the establishment of the proposed confederation, authorized her delegates in Congress to convey to the United States in Congress assembled all her territory northwestward of the Ohio River, and, on the first day of March, 1784, her delegates in Congress, consisting of Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, and pursuant to the Act of October

The power of laying taxes for state purposes has not been "delegated to the United States by the Constitution, nor prohibited by it to the States," and, in consequence, this power has been "reserved to the States." It was never contemplated that the States would lay levies for national purposes, or that the Federal Government would lay them for state purposes. On the contrary, we have, under the Constitution, two distinct powers of taxation, the one for federal, and the other for state purposes; and it is exercised, in the one case, exclusively by the Federal Government, and, in the other, by the State. Neither may encroach upon the other. Otherwise, there would be an irreconcilable conflict between an indestructible Union, upon the one hand, and equally indestructible States, upon the other. It is true that one State may not destroy the Union, but it is equally true that the Union may not destroy one State. In addition to this, the power of taxation in each government is lodged in the legislative department thereof, and may not be exercised by the judicial department of either government in any case.

What, then, is the character and the purpose of the particular tax that
*584 it would be sought to levy by the writ * of mandamus prayed? Clearly it is a state tax, to be devoted exclusively to a state purpose; that is to say, to the payment of a state debt, and is such a tax as may be authorized, in consequence of the Tenth Amendment, only by the state government. It involves one of the expressly reserved sovereignties of the State, and this express reservation may not be overturned by an antecedent implication that the power to decide

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20, 1783, presented a deed to Congress ceding all the territory of Virginia northwestward of the Ohio River to the United States upon certain terms, conditions and trusts therein set forth, which deed of cession was accepted according to its terms, and directed to be recorded and enrolled among the Acts of the United States in Congress assembled. Among the conditions set out in the deed and accepted by Congress was the following:

"(F) That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It further appears from the requisitions made by Congress upon the thirteen States at the time of this cession that Virginia's "usual respective proportion in the general charge and expenditures" was about one-seventh of the whole; and it seems to be also conceded that the moneys derived from the sale of the lands embraced in this cession were to be applied to the extinguishment of the public debt incurred in the War of the Revolution, which debt was finally paid; so that, after this part of the trust had been met, and certain other conditions of the deed had been performed, the residue of the trust fund should have been applied to the reserved interests of the States set forth in Article (F) of the deed, Virginia included, and to "no other use or purpose whatsoever." Instead of doing this, however, Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms.

The total acreage embraced, according to government surveys, in the cession amounted to 170,208,613 acres, and out of this Congress seems to have donated to local uses, contrary to the deed, 38,864,189 acres, which, valued at $2 per acre, the price fixed by Congress when these lands were offered for sale by the Act of May 18, 1796, would amount to $77,728,378. In addition to this, proceeds of the sales of lands amounting to $2,953,654.70 were likewise donated to local uses, making an aggregate of donations contrary to the deed of $80,682,032.70.

In addition to this, their information is that the trust has not even yet been entirely administered, but that there remains on hand undisposed of several thousand acres of these lands; and, not adding the value of these to the value of the local donations above ascertained and allowing unto Virginia one-seventh thereof as her residuary interest in the trust, there would be due and payable from the Government of the United States to the State of Virginia the sum at the least, of $12,000,000, in which West Virginia should share

necessarily embraces the power to execute. The conclusion, therefore, would seem to be irresistible that the Federal Government cannot, through its judicial or any other department, coerce a State in the exercise of its reserved powers by compelling the legislature thereof to exercise such powers contrary to its discretion, and in opposition to its will. The existence and exercise of such a power would overturn the Tenth Amendment, and make serious inroads upon the fundamental rights of the States. In other words, the provision contained in § 2 of Art. III, of the Constitution, giving the Supreme Court original jurisdiction "in all cases . . . in which a State shall be a party," if it should have added to it, by inference or argument, and as an incident to such jurisdiction, the power to enforce a judgment rendered in any such case through the medium of a writ of mandamus controlling the legislative action of a State in respect to its reserved powers, would render the subsequently adopted Tenth Amendment abortive.

In the case of *South Dakota* v. *North Carolina,* 192 U. S. 286, Mr. Justice Brewer, in delivering the majority opinion of the court, speaks of "the absolute inability of a court to compel a levy of taxes by the legislature"; and the foregoing conclusion is further strengthened by the opinions of this court, speaking through Mr. Justice Miller, in the cases of *Heine* v. *Levee Commissioners,* 19 Wall. 655, and *Rees* v. *Watertown,* 19 Wall. 107.

*585 To like effect is *Meriwether* v. *Garrett,* 102 U. S. 472, and * the reasoning of this court in *Kentucky* v. *Dennison,* 24 How. 66. See also *Carter* v. *State,* 42 La. Ann. 927.

Jurisdiction to hear and determine may, and does ordinarily, include the power to enforce (or rather the power to issue proper writs for the enforcement of a judgment); but mandamus cannot, under the Constitution, become a substitute for a writ of execution upon a judgment against a State. Execution may be issued upon a judgment regularly rendered against a State, and be levied upon any property owned by the State. and not devoted to political or governmental purposes, and, if no such property be found, the writ must be returned *nulla bona,* and the end of the law has been reached, because, as we have seen, the legislative department of a State may not be coerced, under the Constitution; and there is nothing remarkable in this situation, because frequently judgments are rendered and executions issued thereon which are returned *nulla bona,* and all legal remedies thereby exhausted. The courts can only give suitors the proper process, original and final, and, if these fail to satisfy the creditor's claim, there is no fault in the judiciary. In other words, jurisdiction does not include or imply the collection or satisfaction of a debt, but only means the power to hear and determine, and to render judgment therefor and issue proper process thereon.

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in the same ratio that she is compelled to contribute to the payment of Virginia's debt; that is to say, she should receive 23½% thereof.

The foregoing epitome of said claim is based upon information and belief, and, in support thereof, a copy of the message of Governor Swanson of Virginia to the General Assembly of that State, and dated January 24, 1910, is exhibited herewith as a part of this return.

WHEREFORE, said respondents, and each of them, pray that said rule may be discharged, and the peremptory writ of mandamus denied.

STATE OF WEST VIRGINIA,

[Here follow the signatures of the individual respondents.]

By E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

[Verification]

Cases in which subordinate agencies of a State have been compelled by mandamus to levy taxes in accordance with their duty under the state law throw no light on the situation.

Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State. At common law, Parliament never was, and could not be, coerced by the writ of mandamus. *People* v. *Morton,* 156 N. Y. 136. And, in this country, the same principles and usages have always obtained. *Ex parte Echols,* 39 Alabama, 698;
*586 * *State* v. *Bolte,* 151 Missouri, 362. Certainly such is true with respect to the mandamus of state legislatures by state courts, and there is no case on record where this court has ever addressed a writ of this character to the law-making power of a State.

We are not unmindful of the dangers and difficulties of analogy; but, if this were the case of an individual judgment debtor, it is plain that, after a writ of execution had gone against him and been returned *nulla bona,* and after it had been ascertained, in addition thereto, that he had no real estate out of which to satisfy the judgment, although he might have great earning capacity, no one would contend that the exercise thereof might be compelled by the writ of mandamus, He might be able to sing or dance, and even be bound by contract to do both, and yet he would not be compelled to do either. *Lumley* v. *Wagner,* 1 De G., M. & G. 604.

It may be answered that a fund was created by mandamus for the payment of a debt in the case of *Supervisors* v. *United States,* 4 Wall. 435, and like cases. But it will be observed that in each of those cases all necessary legislative action had theretofore been had, and the proper ministerial agents appointed for the effectuation thereof; so that nothing was left to be done except to have resort either to the state or federal courts for a writ of mandamus to compel the performance of a purely ministerial act; made mandatory by the act of the only branch of government having any discretion in the premises.

Section 8 of Art. 8 of the West Virginia constitution of 1863 imposed no ministerial duties upon the legislature of the State, but only judicial and legislative duties. We come back, therefore, to the question whether or not this court can or will interfere by mandamus to coerce the action of a state legislature in the performance of purely legislative functions within its exclusive jurisdiction,
*587 and this, it is submitted, this court will not do, for the same * reason, among others, that it refused in the case of *Louisiana* v. *Jumel,* 107 U. S. 711, to oust the political power of the State of Louisiana of its jurisdiction, and set the judiciary in its place.

It should be further observed that the petition prays for a mandamus commanding the legislature to assess and levy a tax to provide for the payment of the judgment unless the legislature shall provide for the payment by bonds. This not only illustrates, but actually invokes, the discretion of the legislature, and does not at that embody all of its discretionary power when measured by the constitutional provision invoked. The legislature could perhaps under the state constitution, either (1) lay a tax upon all property, real and personal, within the State, to be collected at once, sufficient to pay the judgment, or (2) it might, under that constitution distribute the tax over a period of years, or (3) it might resort to a bond issue, which would be governed either by § 8 of Art. 8 of the constitution of 1863, or by § 4 of Art. 10 of the present constitution.

If under the former, a sinking fund would have to be provided "sufficient to pay the accruing interest and redeem the principal within thirty-four years"; that is to say, the period of payment might be short or long, either one year or

thirty-four, within the discretion of the legislature. And if under the latter, payment would have to be "equally distributed over a period of at least twenty years"; that is to say, the annual contributions to the sinking fund would have to be equal for a period of twenty years or more, again at the discretion of the legislature. In any event, the wide discretion of the legislature is illustrated; and it should be further borne in mind that that body is composed of two houses, one of which might deem its discretionary duty to lie in one direction, and the other in another, and yet the two must concur in order to lay a levy or issue bonds.

*588 * Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.

The matter set up in the return of the respondents relative to the cession of the Northwest Territory is an appeal to this court to exercise its discretion against the issuance of the writ herein, under all the circumstances.

If a controversy arises between two States involving a question of boundary, this court applies to the solution of the controversy all the machinery and flexible orders of a court of equity, resulting in the appointment of commissioners for the purpose of ascertaining and monumenting the true boundary, followed by a final decree that extends the jurisdiction of one commonwealth to the line so established, and excludes the jurisdiction of the other from the territory thus covered: and may give final effect to this decree in a thousand and one ways, the particular way being dependent upon the character of the judicial questions that may subsequently spring thereout.

Again, in the event of a final judgment against a State upon bonds issued by her and owned and held by another State, if there be collateral to secure the payment, there is no more difficulty in subjecting it to satisfaction of the judgment than there would be in the case of an individual, and such was the conclusion of this court in *South Dakota* v. *North Carolina*, 192 U. S. 286.

Likewise, in the case of a mere money judgment, the writ would be one of the ordinary writs of execution, and would take its course as in the case of an individual; and the exercise of judicial power involves nothing more. It neither contemplates nor promises the unusual or the forbidden, and incompetence may not be predicated upon such a situation by any one.

*589 * Mr. Chief Justice White delivered the opinion of the court.

A rule allowed at the instance of Virginia against West Virginia to show cause why, in default of payment of the judgment of this court in favor of the former State against the latter, an order should not be entered directing the levy of a tax by the legislature of West Virginia to pay such judgment, and a motion by West Virginia to dismiss the rule is the matter before us.

In the suit in which the judgment was rendered, Virginia, invoking the original jurisdiction of this court, sought the enforcement of a contract by which it was averred West Virginia was bound. The judgment which resulted was for $12,393,929.50 with interest and it was based upon three propositions specifically found to be established: First, that when territory was carved out of the dominion of the State of Virginia for the purpose of constituting the area of the State of West Virginia, the new State, coincidently with its existence, became bound for and assumed to pay its just proportion of the previous public debt of Virginia. Second, that this obligation of West Virginia was the subject of a contract between the two States, made with the consent of Congress, and was incor-

porated into the constitution by which West Virginia was admitted by Congress into the Union, and therefore became a condition of such admission and a part of the very governmental fiber of that State. Third, that the sum of the judgment rendered constituted the equitable proportion of this debt due by West Virginia in accordance with the obligations of the contract.

The suit was commenced in 1906 and the judgment rendered in 1915. The various opinions expressed during the progress of the cause will be found
590 in the reported * cases cited in the margin,[1] in the opinion in one of which (234 U. S. 117), a chronological statement of the incidents of the controversy was made.

The opinions referred to will make it clear that both States were afforded the amplest opportunity to be heard and that all the propositions of law and fact urged were given the most solicitous consideration. Indeed, it is also true that in the course of the controversy, as demonstrated by the opinions cited, controlled by great consideration for the character of the parties, no technical rules were permitted to frustrate the right of both of the States to urge the very merits of every subject deemed by them to be material.

And, controlled by a like purpose, before coming to discharge our duty in the matter now before us, we have searched the record in vain for any indication that the assumed existence of any error committed has operated to prevent the discharge by West Virginia of the obligations resulting from the judgment and hence has led to the proceeding to enforce the judgment which is now before us. In saying this, however, we are not unmindful that the record contains a suggestion of an alleged claim of West Virginia against the United States, which was not remotely referred to while the suit between the two States was undetermined, the claim referred to being based on an assumed violation of trust by the United States in the administration of what was left of the great domain of the Northwest Territory—a domain as to which, before the adoption of the Constitution of the United States, Virginia at the request of Congress transferred to the government of the Confederation all her right, title and interest in order to allay discord between the States, as New York had previously done and as Massachusetts, Connecticut, South Carolina, North Carolina and Georgia
*591 * subsequently did.[2] It is obvious that the subject was referred to, in connection with the duty of West Virginia to comply with the requirements of the judgment, upon the hypothesis that if the United States owed the claim, and if in a suit against the United States recovery could be had, and if West Virginia received its share, it might be used, if sufficient, for discharging the judgment, and thus save West Virginia from resorting to other means for so doing.

That judicial power essentially involves the right to enforce the results of its exertion is elementary. *Wayman* v. *Southard,* 10 Wheat. 1, 23; *Bank of the United States* v. *Halstead,* 10 Wheat. 57; *Gordon* v. *United States,* 117 U. S. 697, 702. And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred

[1] 206 U. S. 290; 209 U. S. 514; 220 U. S. 1; 222 U. S. 17; 231 U. S. 89; 234 U. S. 117; 238 U. S. 202; 241 U. S. 531.

[2] Gannett, Boundaries of the United States, pp. 24–29.

upon this court by the Constitution is therefore certain. The many cases in which such controversies between States have been decided in the exercise of original jurisdiction make this truth manifest.[1] Nor is there room for
*592 contending * to the contrary because, in all the cases, cited, the States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. This must be unless it can be said that, because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute.

It is true that in one of the cited cases (*South Dakota* v. *North Carolina,* 192 U. S. 286) it was remarked that doubt had been expressed in some instances by individual judges as to whether the original jurisdiction conferred on the court by the Constitution embraced the right of one State to recover a judgment in a mere action for debt against another. In that case, however, it is apparent that the court did not solve such suggested doubt, as that question was not involved in the case then before it and that subject was hence left open to be passed on in the future when the occasion required. But the question thus left open has no bearing upon and does not require to be considered in the case before us, first, because the power to render the judgment as between the two States whose enforcement is now under consideration is as to them foreclosed by the fact of its rendition. And second, because, while the controversy between the States culminated in a decree for money and that subject was within the issues, nevertheless, the generating cause of the controversy was the carving out of the dominion of one of the States the area composing the other and the resulting and expressly assumed obligation of the newly created State to pay the just proportion
*593 of the preëxisting debt, an obligation * which, as we have seen, rested in contract between the two States, consented to by Congress and expressed in substance as a condition in the Constitution by which the new State was admitted into the Union. In making this latter statement we do not overlook the truism that the Union under the Constitution is essentially one of States equal in local governmental power, which therefore excludes the conception of an inequality of such power resulting from a condition of admission into the Union. *Ward* v. *Race Horse,* 163 U. S. 504. But this principle has no application to the question of power to enforce against a State when admitted into the Union a con-

[1] *New York* v. *Connecticut,* 4 Dall. 1, 3, 6; *New Jersey* v. *New York,* 3 Pet. 461; 5 Pet. 284; 6 Pet. 323; *Rhode Island* v. *Massachusetts,* 7 Pet. 651; 11 Pet. 226; 12 Pet. 657; 13 Pet. 23; 14 Pet. 210; 15 Pet. 233; 4 How. 591; *Massachusetts* v. *Rhode Island,* 12 Pet. 755; *Missouri* v. *Iowa,* 7 How. 660; 10 How. 1; *Florida* v. *Georgia,* 11 How. 293; 17 How. 478; *Alabama* v. *Georgia,* 23 How. 505; *Virginia* v. *West Virginia,* 11 Wall. 39; *Missouri* v. *Kentucky,* 11 Wall. 395; *South Carolina* v. *Georgia,* 93 U. S. 4; *Indiana* v. *Kentucky,* 136 U. S. 479; 159 U. S. 275; 163 U. S. 520; 167 U. S. 270; *Nebraska* v. *Iowa,* 143 U. S. 359; 145 U. S. 519; *Iowa* v. *Illinois,* 147 U. S. 1; 151 U. S. 238; 202 U. S. 59; *Virginia* v. *Tennessee,* 148 U. S. 503; 158 U. S. 267; *Missouri* v. *Iowa,* 160 U. S. 688; 165 U. S. 118; *Tennessee* v. *Virginia,* 177 U. S. 501; 190 U. S. 64; *Missouri* v. *Illinois,* 180 U. S. 208; 200 U. S. 496; 202 U. S. 598; *Kansas* v. *Colorado,* 185 U. S. 125; 206 U. S. 46; *South Dakota* v. *North Carolina,* 192 U. S. 286; *Missouri* v. *Nebraska,* 196 U. S. 23; 197 U. S. 577; *Louisiana* v. *Mississippi,* 202 U. S. 1; *Washington* v. *Oregon,* 211 U. S. 127; 214 U. S. 205; *Missouri* v. *Kansas,* 213 U. S. 78; *Maryland* v. *West Virginia,* 217 U. S. 1; 217 U. S. 577; 225 U. S. 1; *North Carolina* v. *Tennessee,* 235 U. S. 1; 240 U. S. 652; *Arkansas* v. *Tennessee,* 246 U. S. 158.

tract entered into by it with another State with the consent of Congress, since such question but concerns the equal operation upon all the States of a limitation upon them all imposed by the Constitution, and the equal application of the authority conferred upon Congress to vivify and give effect by its consent to contracts entered into between States.

Both parties admit that West Virginia is the owner of no property not used for governmental purposes and that therefore, from the mere issue of an execution, the judgment is not susceptible of being enforced if, under such execution, property actually devoted to immediate governmental uses of the State may not be taken. Passing a decision as to the latter question, all the contentions on either side will be disposed of by considering two subjects: first, the limitations on the right to enforce inhering in the fact that the judgment is against a State and its enforcement against such governmental being; and second, the appropriateness of the form of procedure applicable for such enforcement. The solution of these subjects may be disposed of by answering two questions which we propose to separately state and consider.

1. *May a judgment rendered against a State as a State be enforced*
*594 *against it as such, including the right, to the extent * necessary for so doing, of exerting authority over the governmental powers and agencies possessed by the State?*

On this subject Virginia contends that, as the Constitution subjected the State of West Virginia to judicial authority at the suit of the State of Virginia, the judgment which was rendered in such a suit binds and operates upon the State of West Virginia, that is, upon that State in a governmental capacity, including all instrumentalities and agencies of state power, and indirectly binding the whole body of the citizenship of that State and the property which, by the exertion of powers possessed by the State, are subject to be reached for the purpose of meeting and discharging the state obligation. As then, the contention proceeds, the legislature of West Virginia possesses the power to tax and that body and its powers are all operated upon by the judgment, the inability to enforce by means of ordinary process of execution gives the right and sanctions the exertion of the authority to enforce the judgment by compelling the legislature to exercise its power of taxation. The significance of the contention and its scope are aptly illustrated by the reference in argument to the many decided cases holding that, where a municipality is empowered to levy specified taxation to pay a particular debt, the judicial power may enforce the levy of the tax to meet a judgment rendered in consequence of a default in paying the indebtedness.[1]

On the other hand, West Virginia insists that the defendant as a State may not, as to its powers of government reserved to it by the Constitution, be
*595 controlled or limited by process for the purpose of enforcing the * payment of the judgment. Because the right for that end is recognized, to obtain an execution against a State and levy it upon its property, if any, not used for governmental purposes, it is argued, affords no ground for upholding the power, by compelled exercise of the taxing authority of the State, to create a fund which

[1] *Supervisors* v. *United States,* 4 Wall. 435; *Von Hoffman* v. *City of Quincy* 4 Wall. 535; *City of Galena* v. *Amy,* 5 Wall. 705; *Riggs* v. *Johnson County,* 6 Wall. 166; *Walkley* v. *City of Muscatine,* 6 Wall. 481; *Labette County Commissioners* v. *Moulton,* 112 U. S. 217; *County Commissioners of Cherokee County v. Wilson,* 109 U. S. 621.

may be used when collected for paying the judgment. The rights reserved to the States by the Constitution, it is further insisted, may not be interfered with by the judicial power merely because that power has been given authority to adjudicate at the instance of one State a right asserted against another, since, although the authority to enforce the adjudication may not be denied, execution to give effect to that authority is restrained by the provisions of the Constitution which recognize state governmental power.

Mark, in words a common premise—a judgment against a State and the authority to enforce it—is the predicate upon which is rested on the one hand the contention as to the existence of complete and effective, and the assertion, on the other, of limited and inefficacious power. But it is obvious that the latter can only rest upon either treating the word state, as used in the premise, as embracing only a misshapen or dead entity, that is, a State stripped for the purpose of judicial power of all its governmental authority, or, if not, by destroying or dwarfing the significance of the word state as describing the entity subject to enforcement, or both. It needs no argument to demonstrate that both of these theories are incompatible with and destructive of the very numerous cases decided by this court to which we have referred. As it is certain that governmental powers reserved to the States by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were not subject to judicial power, that is, to be impleaded, it must follow that, when the Constitution gave
*596 original * jurisdiction to this court to entertain at the instance of one State a suit against another, it must have been intended to modify the general rule, that is, to bring the States and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision. And the context of the Constitution, that is, the express prohibition which it contains as to the power of the States to contract with each other except with the consent of Congress, the limitations as to war and armies, obviously intended to prevent any of the States from resorting to force for the redress of any grievance real or imaginary, all harmonize with and give force to this conception of the operation and effect of the right to exert, at the prayer of one State, judicial authority over another.

But it is in substance said this view must be wrong for two reasons: (a) because it virtually overrides the provision of the Constitution reserving to the States the powers not delegated, by the provision making a grant of judicial power for the purpose of disposing of controversies between States; and (b) because it gives to the Constitution a construction incompatible with its plain purpose, which was, while creating the nation, yet, at the same time, to preserve the States with their governmental authority in order that state and nation might endure. Ultimately, the argument at its best but urges that the text of the Constitution be disregarded for fear of supposed consequences to arise from enforcing it. And it is difficult to understand upon what ground of reason the preservation of the rights of all the States can be predicated upon the assumption that any one State may destroy the rights of any other without any power to redress or cure the resulting grievance. Nor, further, can it be readily understood why it is assumed that the preservation and perpetuation of the
*597 Constitution depend upon the absence * of all power to preserve and give

effect to the great guarantees which safeguard the authority and preserve the rights of all the States.

Besides, however, the manifest error of the propositions which these considerations expose, their want of merit will be additionally demonstrated by the history of the institutions from which the provisions of the Constitution under review were derived, and by bringing into view the evils which they were intended to remedy and the rights which, it was contemplated, their adoption would secure.

Bound by a common allegiance and absolutely controlled in their exterior relations by the mother country, the colonies before the Revolution were yet as regards each other practically independent, that is, distinct one from the other. Their common intercourse, more or less frequent, the contiguity of their boundaries, their conflicting claims, in many instances, of authority over undefined and outlying territory, of necessity brought about conflicting contentions between them. As these contentions became more and more irritating, if not seriously acute, the necessity for the creation of some means of settling them became more and more urgent, if physical conflict was to be avoided. And for this reason, it is to be assumed, it early came to pass that differences between the colonies were taken to the Privy Council for settlement and were there considered and passed upon during a long period of years, the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by Parliament. This power, it is undoubtedly true, was principally called into play in cases of disputed boundary, but that it was applied also to the complaint of an individual against a colony concerning the wrongful possession of property by the colony alleged to belong to him, is not disputed. This general situation as to the disputes between
*598 the colonies and the power to dispose of them by * the Privy Council was stated in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 739, *et seq.,* and will be found reviewed in the authorities referred to in the margin.[1]

When the Revolution came and the relations with the mother country were severed, indisputably controversies between some of the colonies, of the greatest moment to them, had been submitted to the Privy Council and were undetermined. The necessity for their consideration and solution was obviously not obscured by the struggle for independence which ensued, for, by the Ninth of the Articles of Confederation, an attempt to provide for them as well as for future controversies was made. Without going into detail it suffices to say that that article in express terms declared the Congress to be the final arbiter of controversies between the States and provided machinery for bringing into play a tribunal which had power to decide the same. That these powers were exerted concerning controversies between the States of the most serious character again cannot be disputed. But the mechanism devised for their solution proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution, a deficiency of power which was generic, because resulting from the limited authority over the States conferred by the Articles of Confederation on Congress as to every subject. That this absence of power to control the governmental attributes of the States, for the purpose of enforcing findings con-

[1] Acts of the Privy Council, Colonial Series, vols. I to V, passim; Snow, The Administration of Dependencies, Chap. V and passim; Gannett, Boundaries of the United States, pp. 35, 41, 44, 49-52, 73, 88; Story on the Constitution (5th ed.), §§ 80, 83, 1681.

cerning disputes between them, gave rise to the most serious consequences, and brought the States to the very verge of physical struggle, and resulted in the shedding of blood and would, if it had not been for the adoption of the
*599 Constitution of the United States, it * may be reasonably assumed, have rendered nugatory the great results of the Revolution, is known of all and will be found stated in the authoritative works on the history of the time.[1]

Throwing this light upon the constitutional provisions, the conferring on this court of original jurisdiction over controversies between States, the taking away of all authority as to war and armies from the States and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against. This result stands out in the boldest possible relief when it is borne in mind that, not a want of authority in Congress to decide controversies between States, but the absence of power in Congress to enforce as against the governments of the States its decisions on such subjects, was the evil that cried aloud for cure, since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress and the judicial power as to States created, joined with the prohibitions placed upon the States, all combined to unite the authority to decide with the power to enforce—a unison which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future. And, while it may not materially add to the demonstration of the result stated, it may serve a useful purpose to direct attention to the probable operation of tradition upon the mind of the framers, shown by the fact that, harmonizing with the practice which prevailed
*600 during the colonial period in the * Privy Council, the original jurisdiction as conferred by the Constitution on this court embraced not only controversies between States but between private individuals and a State—a power which, following its recognition in *Chisholm* v. *Georgia,* 2 Dall. 419, was withdrawn by the adoption of the Eleventh Amendment. The fact that in the Convention, so far as the published debates disclose, the provisions which we are considering were adopted without debate, it may be inferred, resulted from the necessity of their enactment, as shown by the experience of the colonies and by the spectre of turmoil, if not war, which, as we have seen, had so recently arisen from the disputes between the States, a danger against the recurrence of which there was a common purpose efficiently to provide. And it may well be that a like mental condition accounts for the limited expressions concerning the provisions in question in the proceedings for the ratification of the Constitution which followed, although there are not wanting one or two instances where they were referred to which when rightly interpreted make manifest the purposes which we have stated.[2]

The State, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even al-

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[1] Fiske, The Critical Period of American History, pp. 147 *et seq.;* McMaster, History of the People of the United States, vol. I, pp. 210 *et seq.;* Miner, History of Wyoming. See also Story on the Constitution (5th ed.), §§ 1679, 1680; 131 U. S., Appendix L.

[2] Vol. 2, Elliot's Debates, pp. 462, 490, 527; Vol. 3, pp. 571, 573; The Federalist, No. 81.

though their exertion may operate upon the governmental powers of the State, we are brought to consider the second question, which is:

2. *What are the appropriate remedies for such enforcement?*

Back of the consideration of what remedies are appropriate, whether looked at from the point of view of the exertion of equitable power or the application of legal remedies extraordinary in character (mandamus, etc.,) lies
*601 * the question what ordinary remedies are available, and that subject must necessarily be disposed of. As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the federal government, judicial, legislative or executive, which may be appropriately exercised. And, confining ourselves to a determination of what is appropriate in view of the particular judgment in this cause, two questions naturally present themselves: (a) the power of Congress to legislate to secure the enforcement of the contract between the States; and (b) the appropriate remedies which may by the judicial power be exerted to enforce the judgment. We again consider them separately.

(a) *The power of Congress to legislate for the enforcement of the obligation of West Virginia.*

The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not,
*602 within the principle of *McCulloch* v. *Maryland,* * 4 Wheat. 316, relevant to the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary.

Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete, limited of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true, it further follows, as we have already seen, that, by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States. Indeed, the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere statements proves to the contrary, since at last it comes to insisting that any one State may, by violating its obligations under the Constitution, take away the rights of another and thus destroy constitutional government. Obviously, if it be conceded that no power obtains to enforce as against a State its duty under the Constitution in

one respect and to prevent it from doing wrong to another State, it would follow that the same principle would have to be applied to wrongs done by other States, and thus the government under the Constitution would be not an indissoluble union of indestructible States but a government composed of States each having the potency with impunity to wrong or degrade another—a result which would inevitably lead to a destruction of the union between them. Besides, it must be apparent that to treat the power of Congress to legislate to secure the performance by a State of its duty under the Constitution, that is, its continued re-
*603 spect for and obedience to that instrument, as coercion, comes back * at last to the theory that any one State may throw off and disregard without sanction its obligation and subjection to the Constitution. A conclusion which brings at once to the mind the thought that to maintain the proposition now urged by West Virginia would compel a disregard of the very principles which led to the carving out of that State from the territory of Virginia; in other words, to disregard and overthrow the doctrines irrevocably settled by the great controversy of the Civil War, which in their ultimate aspect find their consecration in the amendments to the Constitution which followed.

Nor is there any force in the suggestion that the existence of the power in Congress to legislate for the enforcement of a contract made by a State under the circumstances here under consideration is incompatible with the grant of original jurisdiction to this court to entertain a suit between the States on the same subject. The two grants in no way conflict, but coöperate and coördinate to a common end, that is, the obedience of a State to the Constitution by performing the duty which that instrument exacts. And this is unaffected by the fact that the power of Congress to exert its legislative authority, as we have just stated it, also extends to the creation of new remedies in addition to those provided for by § 14 of the Judiciary Act of 1789 (1 Stat. 81, c. 20, now § 262, Judicial Code) to meet the exigency occasioned by the judicial duty of enforcing a judgment against a State under the circumstances as here disclosed. We say this because we think it is apparent that to provide by legislative action additional process relevant to the enforcement of judicial authority is the exertion of a legislative and not the exercise of a judicial power.

This leaves only the second aspect of the question now under consideration

(b) *The appropriate remedies under existing legislation.*

*604 The remedy sought, as we have at the outset seen, is * an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said. But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and on the other hand it is contended that the duty to give effect to the judgment against the State, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question and should also now leave undetermined the further question, which, as the result of the inherent duty resting on us to give effect to the judicial power exercised, we

have been led to consider on our own motion, that is, whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. We say this because, impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against a State and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a two-fold way having been also pointed out, we are fain to believe that, if we refrain now from passing upon the question stated, we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution. Indeed, irrespective of these considerations, upon the assumption that both the
*605 requirements * of duty and the suggestions of self-interest may fail to bring about the result stated, we are nevertheless of the opinion that we should not now finally dispose of the case, but because of the character of the parties and the nature of the controversy—a contract approved by Congress and subject to be by it enforced—we should reserve further action in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses.

Giving effect to this view, accepting the things which are irrevocably foreclosed--briefly stated, the judgment against the State operating upon it in all its governmental powers and the duty to enforce it viewed in that aspect—, our conclusion is that the case should be restored to the docket for further argument at the next term after the February recess. Such argument will embrace the three questions left open: 1. The right under the conditions previously stated to award the mandamus prayed for; 2. If not, the power and duty to direct the levy of a tax as stated; 3. If means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy, by dealing with the funds or taxable property of West Virginia or the rights of that State, as may secure an execution of the judgment. In saying this, however, to the end that, if, on such future hearing provided for, the conclusion should be that any of the processes stated are susceptible of being lawfully applied (repeating that we do not now decide such questions), occasion for a further delay may not exist, we reserve the right, if deemed advisable, at a day hereafter before the end of the term or at the next term before the period fixed for the hearing, to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state legislature or direct action, to secure the full execution of the
*606 * judgment, as well as concerning the means otherwise existing in the State of West Virginia, if any, which, by the exercise of the equitable powers in the discharge of the duty to enforce payment, may be available for that purpose.

And it is so ordered.

State of Arkansas v. State of Tennessee.

Supreme Court of the United States, 1918.

[247 *United States*, 461.]

Defining the principles determining the boundary between Arkansas and Tennessee in accordance with the previous opinion and decision, 246 U. S. 158, and appointing a commission, duly empowered, to locate and designated the line, with instructions to report, etc.

THIS cause came on to be heard at this Term and was argued by counsel; and thereupon and on consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz:

1. The true boundary line between the States of Arkansas and Tennessee, aside from the question of the avulsion of 1876, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi river as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion of March 7, 1876, which resulted in the formation of a new channel known as the Centennial Cut-off, the boundary line between said States was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said States should now be located along that portion of the bed of said river that was left dry as the result of said avulsion, according to the middle of the main navigable channel as it existed at the time the current ceased to flow therein as the result of said avulsion.

*462 4. A commission consisting of C. B. Bailey, of Wynne, * Arkansas, Horace Vandeventer, of Knoxville, Tennessee, and Charles A. Barton, of Memphis, Tennessee, competent persons, is here and now named by the court, upon the suggestion of counsel, to run, locate, and designate the boundary line between said States along that portion of the bed of said river that was left dry as the result of said avulsion, in accordance with the above principles: Commencing at the upper end of the abandoned portion of the river bed at or about the beginning or head of said Centennial Cut-off, and thence following along the middle of the former main channel of navigation by its several courses and windings to the lower end of the abandoned portion of said river bed at or about the terminus or outlet of said Centennial Cut-off.

5. In the event the said Commission cannot now locate with reasonable certainty the line of the river as it then ran, that is, at or immediately before the avulsion of 1876, it shall report the nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said Commission shall give its findings of fact and the evidence on which the same are based.

6. Before entering upon the discharge of their duties, each of said commissioners shall be duly sworn to perform faithfully, impartially, and without prejudice or bias the duties herein imposed; said oaths to be taken before the Clerk of this court, or before the Clerk of any District Court of the United States, or before an officer authorized by law to administer an oath in the State of Arkansas

or of Tennessee, and returned with their report; that said Commission is authorized and empowered to make examination of the territory in question, and to adopt all ordinary and legitimate methods in the ascertainment of the true
*463 location of said boundary line; to summon * witnesses and take evidence under oath; to compel the attendance of witnesses and require them to testify; to call for and require the production of papers and other documentary evidence; such evidence, however, to be taken upon notice to the parties, with permission to attend by counsel and cross-examine the witnesses; and all evidence taken and all exceptions thereto and rulings thereon shall be preserved and certified and returned with the report of said commissioners; and said commissioners are also at liberty to refer to and consult the printed record in the cause and the opinion of this court delivered on March 4, 1918, and to do all other matters necessary to enable them to discharge their duties and attain the end to be accomplished comformably to this decree.

7. It is further ordered that should any vacancy or vacancies occur in said board of commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies, the Chief Justice acting upon such information in the premises as may be satisfactory to him.

8. It is further ordered that said commissioners do proceed with all convenient dispatch to discharge their duties conformably to this decree, and they are authorized, if they deem it necessary, to request the coöperation and assistance of the state authorities of Arkansas and Tennessee, or either of those States, in the performance of the duties hereby imposed.

9. It is further ordered that the Clerk of this court shall forward at once to the Governor of each of said States of Arkansas and Tennessee and to each of the commissioners hereby appointed a copy of this decree and of the opinion of this court delivered herein March 4, 1918, duly authenticated.

*464 * 10. The said commissioners shall make a report of their proceedings under this decree as soon as practicable and on or before such date as hereafter shall be fixed by the court, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

11. All other matters are reserved until the coming in of said report.

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U.S. Supreme court.
Judicial settlement
of controversies...